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80-2158
No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ISADORE SPIEGEL, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NATHAN LEWIN
(Counsel of Record)
MARTIN D. MINSKER
SUZANNA SHERRY
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W.—Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the Fifth Amendment privilege against self-incrimination protects a sole proprietor against compelled disclosure of incriminating business and personal financial records prepared by him or at his direction and retained in his own actual or constructive custody.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. ____

ISADORE SPIEGEL, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The orders of the United States District Court for the District of New Jersey, dated January 9, 1981, denying petitioner's motion to quash, denying reconsideration, and holding petitioner in civil contempt of court appear as Appendix C; pp. 5a-9a, *infra.* None are reported. The orders of the United States Court of Appeals for the Third Circuit, dated March 16, 1981, and April 21, 1981, respectively, summarily affirming the district court's contempt order and denying rehearing, appear as Appendices A and B; pp. 1a-3a, *infra,* and are also not reported.

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit, affirming the order of the district court holding petitioner in civil contempt, was rendered on March 16, 1981 (p. 1a, *infra*). A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 21, 1981 (p. 3a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT

1. Introduction

This case involves the constitutional question explicitly left open by this Court in *Fisher* v. *United States*, 425 U.S. 391, 414 (1976): Whether a sole proprietor of a business has a Fifth Amendment privilege against compelled production of personal and business records prepared by him or under his personal direction and retained in his own custody and control.

Petitioner has been doing business as "I. Spiegel," a sole proprietorship, for more than 20 years (p. 73a, *infra*).[1] Petitioner exercises complete control over his sole proprietorship (p. 74a, *infra*). He has maintained only one checking account (in the name of "I. Spiegel") since 1955, and is the only signatory on that account. Petitioner has paid all his personal and business expenses from that one checking account (pp. 73a-74a, 76a, *infra*).[2] Thus, petitioner's personal financial records are intermingled with those of his sole proprietorship. *See* p. 39a, *infra*.

---

[1] The record consists primarily of the transcripts of five hearings, which were held on November 5, 1980, November 17, 1980, December 23, 1980, January 9, 1981, and January 15, 1981. Copies of the full transcripts appear as Appendix E to this petition, pp. 13a-147a, *infra*. All references hereinafter to the transcripts are to "p. ——, *infra*."

[2] "I. Spiegel" also maintains a payroll account, but that account is not used for any other business or personal expenses (p. 76a, *infra*).

In March 1980, a special federal grand jury was empanelled in Newark, New Jersey, and on October 7, 1980, a grand jury subpoena *duces tecum* issued to the custodian of records of "I. Spiegel and any related entity doing business as 'Spiegel Trucking'" was served on petitioner. The subpoena demanded all documents over a five-year period "relating to any business, commercial, or financial transactions between, or relationships with" petitioner, his sole proprietorship and various other corporate or other entities, or "any officer, director, or employee thereof."

Petitioner filed a motion to quash the subpoena on the ground that his Fifth Amendment privilege against self-incrimination precluded the compelled production of the documents sought. It was uncontested that the documents — which were both personal and business records — were created or prepared by or under the personal direction of petitioner. The documents were in his own actual or constructive custody and control until January 15, 1981,[3] when his attorney deposited them with the clerk, under seal, at the order of the district court (pp. 131a-133a, *infra*). It was also uncontested that the documents are potentially incriminatory of petitioner.

2. The District Court's Rulings

Early in the first hearing on petitioner's motion, the district judge (Herbert Stern, J.) advised petitioner's counsel that, in his view, the Supreme Court "has finally come to the conclusion that things, inanimate objects,

[3] I. Spiegel employs three or four bookkeepers who had access to the records on earlier occasions (p. 76a, *infra*).

can never be protected by the Fifth Amendment" (p. 15a, *infra*). The judge went on, in the same hearing, to say, "I do not believe that it is possible any longer to argue that books and records are protected under the Fifth Amendment of the Constitution" (p. 17a, *infra*). He then explained that, in his view, it made no difference whether the records were "personal" or not (p. 22a, *infra*):

> Bellis decided that a three-man law firm's records are not personal. But we have come to understand that personal versus impersonal is not the test any longer because it doesn't matter for Fifth Amendment analysis.

On this basis, the district judge advised petitioner's counsel at the first hearing that (p. 23a, *infra*):

> There simply is no basis to invoke the privilege against incrimination for the books and records of a business, whether that business is General Motors or [a] one-man business.

The judge also demanded that the requested records be delivered to him for an *in camera* examination so that he could determine "how impersonal versus personal the records are" (p. 29a, *infra*). This demand was acceded to by petitioner's counsel during a second hearing held on November 17, 1980. *See* pp. 38a-40a, *infra*. Judge Stern thereupon told counsel his views (p. 36a, *infra*):

> So far as I can see, with the possible exception of private diaries — and there is no reason for that — the Supreme Court has come to the conclusion, finally, that records are not testimonial, and, therefore, are not protected under the Fifth Amendment.

and (*id.*):

> I have ruled that records maintained through the agents and used in business activities, for certain, have no Fifth Amendment protections.

> I will even hold — although I don't have to in this case — that no records in and of themselves are protected under the Fifth Amendment.

Petitioner's counsel then exhibited illustrative portions of the records to the district judge and noted that petitioner "does a lot of his personal transactions" out of the same checking account as is used for his business (p. 39a, *infra*). The judge responded by observing that checks used for personal expenses "are disseminated to third parties" and are photographed by banks and other agencies of the Federal Reserve System (*id.*).

A further hearing was held on December 23, 1980. Petitioner's counsel during that hearing represented to the court and proved by testimony that petitioner (pp. 47a-48a, *infra*):

> has been the sole proprietor of I. Spiegel for some 25 years, that his personal, private affairs, financial affairs, are intermingled with the business affairs of I. Spiegel; that, in fact, he has paid his personal living expenses from the checking account of I. Spiegel. That over this 25-year period he did not have any other personal checking account.

Before hearing the testimony, the district judge repeated his view that "the Fifth Amendment protects only against the forced divulgence of testimony," and added, "I hold that objects, including written objects, past written objects are not protected under the Fifth Amendment" (pp. 62a-63a, *infra*). He added that the documents which he had seen during the previous hearing "are not accounts of intimate relationships with people," but are "ordinary bills and checks," even if some "paid for things which were not to do with the business" (p. 64a, *infra*).

After hearing the testimony, the trial judge said that he could "avoid all the grave Constitutional questions" be-

cause it appeared to him that the records were "impersonal" (pp. 81a-82a, *infra*). The judge based this conclusion on his finding that "the normal place for these records is the firm" and not petitioner's home (p. 82a, *infra*). The judge then suggested that the records be returned to petitioner's office and that one of the bookkeepers be subpoenaed to produce them (*id.*).

On January 9, 1981, the district judge found petitioner to be in civil contempt for failing to turn over the subpoenaed records. At that time, the judge further clarified his decision explaining that (pp. 102a-103a, *infra*):

> given the facts as I heard them, under the traditional Bellis, White, Fleischman line of cases, Malanga in this Circuit, the records are not personal, thus not protected.
>
> I remain of the view that the distinction between personal records and impersonal records are quite mysterious for purpose of the Fifth Amendment, but, nonetheless, working within that framework, it could only be characterized, in my view, as impersonal records. So, therefore, are exempt.

The judge then ordered that the records be turned over and kept under seal pending appeal, threatening to imprison petitioner if he did not agree. He also refused to stay his order (p. 106a, *infra*). Later that day, the judge granted a brief stay of his order to enable a Circuit Judge to consider an application for a further stay (pp. 110a, 113a, *infra*). A stay was thereafter granted by Circuit Judges Gibbons and Weis on January 20, 1981.

The Court of Appeals heard argument on the appeal from Judge Stern's order on February 12, 1981. It issued its one-sentence decision affirming the district court on March 16, 1981. On May 26, 1981, the Court of Appeals

granted a stay of its mandate pending the timely filing and disposition of a petition for a writ of certiorari.

REASON FOR GRANTING THE WRIT

The Decision Of The Lower Courts In This Case Resolves The Issue Reserved In *Fisher* v. *United States* In A Way Which Conflicts With The Resolution Of That Issue By Five Other Circuits

In deciding *Fisher* v. *United States*, 425 U.S. 391 (1976), this Court explicitly reserved the question "whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession . . . ." 425 U.S. at 414. Most courts of appeals have held that the constitutional privilege against self-incrimination still extends to business and personal financial records of a sole proprietor which are retained in his personal custody and which were prepared under his personal control or direction. In *United States* v. *Davis*, 636 F.2d 1028, 1043 (5th Cir. 1981), for example, the Fifth Circuit (per Judge Wisdom) summarized its conclusion as follows (footnotes omitted):

> [A]ny incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in content.

Similar conclusions have been reached by the Second, Eighth and Ninth Circuits. *See United States* v. *Beattie*, 541 F.2d 329, 331 (2d Cir. 1976); *United States* v. *Plesons*, 560 F.2d 890, 892-93 & n.3 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); *United States* v. *Helina*, 549

F.2d 713, 716 (9th Cir. 1977). The Fourth Circuit has assumed this to be the rule. *See United States* v. *Penrod*, 609 F.2d 1092, 1095 & n.5 (4th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).[4] In this case, the district court — having previously expressed the view that "there is no such thing as a Fifth Amendment privilege [as] to records" (p. 15a, *infra*) — held that petitioner's records were not protected under the Fifth Amendment because the records in question were "impersonal" rather than "personal."[5] This ruling conflicts squarely with this Court's statement in *Bellis* v. *United States*, 417 U.S. 85, 87-88 (1974), that:

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony . . . . The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life.

No language in this Court's opinions in *Fisher* v. *United States*, 425 U.S. 391 (1976), or *Andresen* v. *Maryland*, 427 U.S. 463 (1976), repudiated or overruled the summary of long-established law reaffirmed in *Bellis*. Yet in this case the courts below have refused to apply these accepted constitutional principles to petitioner's invocation of his privilege.

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[4] Indeed, a different panel of the Third Circuit also appears to have reached the same conclusion. *See ICC* v. *Gould*, 629 F.2d 847, 858, 859 & n.22 (3d Cir. 1980).

[5] The district court's holding apparently followed from the judge's previously expressed views that the Fifth Amendment affords no protection to business records, whether they belong to a large corporation or to a sole proprietorship. *See* p. 4, *supra*.

The district court's direction that petitioner produce his sole proprietorship's records to the grand jury notwithstanding his well-grounded fear that they will be utilized to incriminate him was an aggravated invasion of his Fifth Amendment rights for the additional reason that petitioner's personal finances were intermingled with the subpoenaed business records. Petitioner maintained only a single checking account, from which he paid both his business and personal expenses. *See* p. 2, *supra*. Consequently, the records in question include cancelled checks that "may provide clear insights into [his] total life-style." *Fisher* v. *United States*, 425 U.S. 391, 427 (1976) (Brennan, J., concurring).

Nor was the Fifth Amendment privilege overcome because of the district court's instruction that petitioner give his records to a bookkeeper so that he would not be required to authenticate them (p. 82a, *infra*). The district court apparently based this holding on its belief that Fifth Amendment protection against the compelled production of documents is strictly limited to the act of "authentication." Lower courts have disagreed over the scope and significance of such reasoning in light of this Court's opinions in *Fisher* (425 U.S. at 412 n.12) and *Andresen* (427 U.S. at 473-74). The district court's proposal in this case conflicts with the holding of the Fifth Circuit in *United States* v. *Davis*, 636 F.2d 1028, 1042-43 (5th Cir. 1981). *See also United States* v. *Penrod*, 609 F.2d 1092, 1095 & n.5 (4th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). Moreover, the district court's holding was incorrect because petitioner's authorization, as custodian of the documents, for their release, would constitute implicit authentication, whether or not petitioner personally physically transported the documents to the grand jury. *See* 425 U.S. at 428-29 (Brennan, J., concurring), 432-33 (Marshall, J., concurring).

Finally, there is no support whatever for the district court's suggestion that the records of the proprietorship or of petitioner's personal expenditures are withdrawn from the reach of the Fifth Amendment if they had been maintained at his business premises. At the time the subpoena was issued, petitioner was the custodian of records of "I. Spiegel," and he in fact accepted service of the subpoena. *See* pp. 27a, 34a, 36a, *infra*. The physical location of the records which were in petitioner's actual or constructive custody was totally irrelevant.[6]

This case thus presents the ultimate question left open in this Court's recent series of decisions dealing with the applicability of the Fifth Amendment's privilege against self-incrimination to financial records of an individual maintained in the personal possession of that individual. If such records are an amalgam of personal and business documentation, a government agency may not compel that individual to surrender those papers for official inspection over his constitutional objection. This case presents an issue of great importance which warrants consideration and resolution by this Court.

[6] The district court recognized that the documents remained in petitioner's "constructive possession" even after they were deposited with the clerk of the court (p. 146a, *infra*).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
MARTIN D. MINSKER
SUZANNA SHERRY
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for Petitioner

JUNE, 1981

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 81-1087

IN THE MATTER OF:
GRAND JURY EMPANELLED March 19, 1980
Isadore Speigel, *Appellant*

Appeal from the United States District Court for the District of New Jersey
(D.C. Misc. No. 80-0053)

Argued February 12, 1981
Before: ALDISERT and HIGGINBOTHAM, *Circuit Judges,* and TEITELBAUM,* *District Judge.*

Judgment Order

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT
/s/ A. LEON HIGGINBOTHAM
A. Leon Higginbotham
Circuit Judge

Attest:
/s/ SALLY MRVOS
Sally Mrvos, *Clerk*

DATED: March 16, 1981

*Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on April 21, 1981.

TEST: Sally Mrvos

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1087

IN THE MATTER OF:
GRAND JURY EMPANELLED March 19, 1980
Isadore Speigel, *Appellant*

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM AND SLOVITER, *Circuit Judges,* and TEITELBAUM, *District Judge.**

The petition for rehearing filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT
/s/ ALDISERT
Aldisert
Judge

DATED: April 21, 1981

*Honorable Hubert I. Teitelbaum, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

APPENDIX C

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Misc. No. 80-53

IN THE MATTER OF:
THE GRAND JURY EMPANELLED March 19, 1980

Order
Filed January 12, 1981

Upon application of Isadore Speigel, by counsel, for an Order of this Court quashing a subpoena dated October 7, 1980 and oral argument thereon

IT IS HEREBY ORDERED this 9th day of January, 1981 that Isadore Speigel's Motion to Quash the Subpoena is denied.

/s/ H. J. STERN
Herbert J. Stern
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 80-53

IN THE MATTER OF:
THE GRAND JURY EMPANELLED March 19, 1980

Order
Filed January 12, 1981

Upon application of Isadore Speigel, by counsel, for a Motion for Reconsideration of this Court's Order Denying his Motion to Quash a subpoena dated October 7, 1980

IT IS HEREBY ORDERED this 9th day of January, 1981 that the Motion for Reconsideration is denied.

/s/ H. J. STERN
Herbert J. Stern
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Misc. No. 80-53

IN THE MATTER OF THE:
GRAND JURY EMPANELLED March 19, 1980

Order of Contempt
Filed January 9, 1981

HONORABLE HERBERT J. STERN

THIS MATTER being opened to the Court by Isadore Spiegel upon his Motion to Quash Subpoena filed on November 3, 1980, and full consideration having been given to this matter, the Court finds:

A. On October 7, 1980, a grand jury subpoena was issued by the Clerk of this Court to the Custodian of Records of I. Spiegel, a sole proprietorship located at Cape May Street, Harrison, New Jersey. The subpoena required production of specifically described business records on November 5, 1980. The subpoena was served on Isadore Spiegel on October 28, 1980.

B. On November 3, 1980, Isadore Spiegel filed a Motion to Quash the Grand Jury Subpoena. Following hearings, this Court denied Spiegel's Motion to Quash Subpoena and ordered Spiegel to produce the records described in the grand jury subpoena.

C. On January 9, 1981, Isadore Spiegel, through counsel, appeared before this Court and refused to obey this Court's order to produce the records described in the grand jury subpoena.

WHEREFORE, it is found that Isadore Spiegel is guilty of contumacious behavior in that he did act as described above;

IT IS THEREFORE ORDERED on this 9th day of January, 1981, that Isadore Spiegel is guilty of contempt of Court, in

that he did refuse to produce information as requested on behalf of the grand jury;

IT IS FURTHER ORDERED that, pursuant to Title 28, United States Code, Section 1826, Isadore Spiegel be fined in the amount of $100.00 each day following the date of the entry of this order until such time as he is willing to produce such information as requested on behalf of the grand jury empanelled on March 19, 1980, or until the expiration of the term of the grand jury, including extensions.

IT IS FURTHER ORDERED that the above Order imposing a fine be stayed until 5 pm, January 16, 1981.

/s/ H. J. STERN
Herbert J. Stern
United States District Court

Dated: January 9, 1981
Newark, New Jersey

APPENDIX D

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Misc. No. 80-53

IN THE MATTER OF THE:
GRAND JURY EMPANELLED March 19, 1980

Order Amending Order of Contempt
Filed January 15, 1981

HONORABLE HERBERT J. STERN

THIS MATTER being opened to the Court by Isadore Spiegel upon his Motion to Quash Subpoena filed on November 3, 1980, and full consideration having been given to this matter, the Court finds:

A. On January 9, 1981, this Court entered an Order adjudging Isadore Spiegel in contempt of court in that he did refuse to produce information as requested on behalf of a grand jury sitting in this District.

B. This Court ordered that, pursuant to Title 28, United States Code, Section 1826, Isadore Spiegel be fined in the amount of $100 each day following the date of the entry of the Order of Contempt until such time as he is willing to produce such information as requested on behalf of the grand jury empanelled on March 19, 1980, or until the expiration of the term of the grand jury, including extensions.

C. The fine imposed is of insufficient amount to compel Isadore Spiegel's compliance with the grand jury subpoena.

WHEREFORE IT IS ORDERED that the amount of the fine imposed be increased from $100 each day to $600 each

day. In all other respects the Court's Order of Contempt entered January 9, 1981, shall remain unchanged.

/s/ H. J. STERN
Herbert J. Stern, Judge
United States District Court

Dated: January 15, 1981
Newark, New Jersey

APPENDIX E

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Misc. No. 80-53

IN THE MATTER OF:
THE GRAND JURY EMPANELLED March 19, 1980

Transcript of Proceedings
Newark, New Jersey
November 5, 1980

Before: The Honorable HERBERT J. STERN, U.S.D.J.

Appearances: WILLIAM W. ROBERTSON, United States Attorney,
By: JOHN KLEIN, Special Attornev
Department of Justice (DC)
For the Government.

STEPHEN E. LAMPF, ESQ.,
For Spiegel Trucking, Inc.

THE COURT: Is this the Grand Jury matter?

MR. KLEIN: It is, your Honor.

THE COURT: Let's go.

MR. KLEIN: John Klein, K-l-e-i-n, for the United States.

MR. LAMPF: Stephen Lampf, L-a-m-p-f, for Spiegel Trucking, Inc., and Hy Spiegel.

THE COURT: Now, what is your motion to quash based on? Fifth Amendment or illness?

MR. KLEIN: I represent the government.

THE COURT: Oh, so sorry.

MR. KLEIN: I have no motion to quash.

THE COURT: This is your first time before me, is it?

MR. KLEIN: It is, your Honor. I'm an attorney with the Department of Justice. —

THE COURT: Excuse me.

MR. KLEIN: — in Washington.

THE COURT: Normally, the government purloins the chair next to the jury rail and likes to smile at them.

MR. KLEIN: I'm sorry, your Honor.

MR. LAMPF: I wouldn't object to hearing the government's argument.

THE COURT: Ha, ha. What is it, now? Health or Fifth Amendment?

MR. LAMPF: I don't think we have to reach the issue of health because of the Fifth Amendment rights.

Hy Spiegel, Spiegel Trucking, is a sole proprietorship, always has been, and, based on a long line of cases —

THE COURT: Culminating in Fisher against the United States and in Andressen versus Maryland.

MR. LAMPF: Yes, sir.

THE COURT: Ha, ha. Which go the other way.

MR. LAMPF: I know.

THE COURT: So what are you going to do? What I really want to know from you is this: If I order it, are you going to comply or are we going to go through a contempt proceeding? Because if we'll go through a contempt proceeding, we'll go through it with all the trappings. You'll make the arguments. I'll make the analysis. Go through Boyd against the United States, Bellis, White, Fleischman, Fisher, Andresen. We'll do it all.

MR. LAMPF: Your Honor, isn't there a recent case, Johannsen — I haven't read it recently — which kind of indicates —

a Third Circuit case — that records which are solely and exclusively those of an individual does carry with it the Fifth Amendment privilege?

THE COURT: I read the Supreme Court opinions to say that there is no such thing as a Fifth Amendment privilege to records. But I don't want to engage in an academic discussion with you. If you are going to comply, then let's — you just want a court order to be sure that it is clear that you are doing it under the compulsion to do it, we'll do it in one way. But if you want to make a record and we'll have review, so forth, so on, then, of course, I would want, and I think you would want, and I'm sure the government would want, to do it in the grand manner.

I will explain to you very simply I have studied this area of the law for years. I know about Lord Camden's opinion. I know about Mr. Justice Bradley's opinion in Boyd. I know about the White case, the Fleischman case. I know about Bellis. I know about Fisher. I know about Andresen.

I think finally, after Boyd in 1886, the Court has finally come to the conclusion that things, inanimate objects, can never be protected by the Fifth Amendment. They are just not. They are not testimonial in nature.

Now, there may be a privacy interest. But the Fifth Amendment doesn't protect privacy interests. The law got mixed up in 1886 in the Boyd case when they ran the Fifth and Fourth Amendments into each other. It has taken since that time to get it straightened out. Until 19, I think, 76 in Fisher and Andresen. That's it now.

If they can take your blood, which they can, if they can take your words from your throat, as a voice symbol, which they can, they can take your urine, which they can. If they can take your fingerprints, which they can, they can take your hair, which they can, books and records are not privileged. They are just not.

MR. LAMPF: Your Honor, are you saying, then, that under no circumstances is an individual's personal documents, personal records, privileged? Is that it?

THE COURT: I say that things are not privileged. Inanimate objects are not testimonial. We can, if you want to push it further, then get into the notion of whether the act of production is an act of testimony.

MR. LAMPF: Your Honor —

THE COURT: But the thing, itself, a book, or a hammer, a gun or a shirt, a page with writing on it or a page which is blank, these things are not in and of themselves testimonial.

I will agree with you that the Courts have not always analyzed it so or even reasonably carefully. But that's where we are today, finally.

MR. LAMPF: Your Honor, there is another — the motion to quash is kind of worded maybe backwards. The primary objection we have is the Constitutional one. The secondary one, but of equal importance, is the physical condition.

THE COURT: That could easily be adjusted. If it's a case of getting to the records in some way which will not at all impair your client's health, that is a different issue. That is easy to make adjustments, compromises. We'll work out a procedure which will be, I think, satisfactory to all concerned. We can do that. That is really a different point.

All I want to know is whether you want me to go through a contempt proceeding so that you will be able to get review or whether you intend to comply.

MR. LAMPF: We will not comply with —

THE COURT: You will not comply?

MR. LAMPF: No.

THE COURT: Then I think we better go through the entire procedure. Get the record in correct order. I'm going to have to, you understand, hold your man in contempt, so forth, so on, if you lose.

MR. LAMPF: Yes, we would have to request that.

THE COURT: That's the only way we can get review.

MR. LAMPF: I know.

THE COURT: Fine. Let's go. What is your motion?

MR. LAMPF: The motion —

THE COURT: You better make your record.

MR. LAMPF: Excuse me?

THE COURT: You better make your record.

MR. LAMPF: The —

THE COURT: I want you also to understand that I think that this motion is without substance any more; that if you lose it, I'm going to put your man in prison. If you can't show me an arguable basis for it, I may not even grant you a stay.

MR. LAMPF: I don't quite understand your — you say there is no longer a justifiable —

THE COURT: No. I do not believe that is is possible any longer to argue that books and records are protected under the Fifth Amendment of the Constitution. As a matter of fact — I mean, the law has been in shambles for years on this, but it isn't any more. It may well be there is a privacy interest to be protected in a private diary, you know, for example. I don't know. But if there is such an interest to be protected, it isn't under the Fifth Amendment. It may well be under the Fourth, which protects privacy. It may be under the First Amendment, which protects freedom of expression. Certainly not under the Fifth Amendment.

Certainly, the notion that books of account, books of doing business, books and records which the IRS usually requires to be kept for the purpose of the business, itself, that these books are somehow protected under the Fifth Amendment as books and records is beyond the pale any longer. And that they should lose their protection instead of a sole proprietor-

ship, it should be a joint proprietor or a three-man business like Bellis, that is nonsense today.

MR. LAMPF: Your Honor, I know of no case, personally, where the Court has — where any court has made a decision precisely where you seem to be coming from. I understand Bellis, which was a partnership, where there was —

THE COURT: Bellis was a three-man law partnership in Philadelphia. The opinion was written by Mr. Justice Marshall.

MR. LAMPF: Yes. I have no quarrel with that decision. Fisher, I think the facts were somewhat different. I think the huge —

THE COURT: Andresen versus Maryland is squarely on point. There you had a one-man law firm. While it is true that the records were obtained not by subpoena, but, instead, by warrant, if they were protected by the Fifth Amendment, they could not be taken in any way at all. True or not true?

MR. LAMPF: My recollection was that the Fifth Amendment — that the Fifth Amendment issue was never involved in that on the basis they were not asking the individual to do anything. Wasn't it a question —

THE COURT: Different question. Act of production. Remember I told you the question of whether the records are protected in and of themselves under the Fifth Amendment was addressed in Andresen, written by Mr. Justice Blackman, as I recall it, and was answered, resoundingly, "No."

MR. LAMPF: Your Honor, wasn't that issue — wasn't that issue — again, I haven't read it recently. I thought that issue had to be — it was a Fourth Amendment issue and the Court was saying: We are not compelling the individual to do anything. It has already been done, whether it was right or not, under the Fourth Amendment.

THE COURT: You see, it is just that kind of argument that marches us backwards, with all respect to you. Either records have Fifth Amendment protection or they don't, qua records.

Andresen says they do not qua record, for, if they did, then they could not be taken. That is to say, neither could they be compelled to be handed over, which is the point you were just making, nor could they be taken by the agents, themselves.

So by Andresen we know that records are not protected merely because they were once written in the hand of the person from whom they were taken in days of yore.

Fisher is the case which addresses the point of whether or not the disclosure, the bringing of them forth, is an act of testimony in and of themselves.

That is the point that you are addressing. That is to say, whether, aside from the nature of the thing that is being brought forth in this case, and in that case records, but in some other case it may be a knife or a gun, a tool, a bloody shirt — for example, if you serve a subpoena that says: "Bring forth your trousers in your closet," that's an act of production, too, isn't it?

MR. LAMPF: Yes, your Honor.

THE COURT: So the issue there — and the trousers are not protected under the Fifth Amendment, are they?

MR. LAMPF: Apparently not.

THE COURT: Well, all I'm saying is neither are the records. Records are not protected because they are records. Trousers are not protected because they are trousers.

The next issue is whether or not the act of producing these things is an act which in and of itself is protected. A good argument can be made that it is. The trouble with that argument is that it would really defeat the ability of the Grand Jury to subpoena things, which is not in and of itself a good reason to deny it.

Nonetheless, we must recognize that there is an act of production in producing blood. True?

MR. LAMPF: Yes, sir.

THE COURT: And they could subpoena a blood sample from your client. True?

MR. LAMPF: Yes, sir.

THE COURT: That is Schmerber versus California.

They could take a voice exemplar from him, too, couldn't they?

MR. LAMPF: Yes, sir.

THE COURT: And the act of producing the voice exemplar would be an act of production and authentification, too, wouldn't it?

MR. LAMPF: Yes, your Honor.

THE COURT: So, too, they could take handwriting samples from him; isn't that so?

MR. LAMPF: Your limited circumstances, I understand that's true; yes.

THE COURT: And the act of production would be an act of authentication as well, would it not?

MR. LAMPF: Yes, sir.

THE COURT: I'm sorry. You want to know why my thinking is so far crystallized in this matter. I'm trying to tell you exactly why it is.

MR. LAMPF: Yes, I'd like you to tell me.

THE COURT: Because — well, it's a process of reasoning which I'm trying to display to you. The first prong in the two-pronged reasoning is that books and records are not things which fall under the protection of the Fifth Amendment, any more than trousers, hammers or swords do. Why, it is axiomatic. For example, suppose you represented a bank robber. Suppose he had in his house the note which read: "Your money or your life," the one he used in the bank robbery. Would that be a record protected under the Fifth Amendment any more than the gun he used?

MR. LAMPF: Your Honor, the problem I have, while I'm not familiar with the quotes back — I guess you were going back one hundred years or so.

THE COURT: Not on that question, I wasn't. That is Warden versus Hayden, really. Warden versus Hayden is really the case which put the sword to this notion that things are in and of themselves protected by the Fifth Amendment. That slayed the mere evidence rule. The mere evidence rule was the product of Boyd against the United States. See, for example, Gouled versus the United States.

But in Warden versus Hayden, the Supreme Court of the United States in 1967 in an opinion by Mr. Justice Brennan, put the end to this doctrine. Things — inanimate objects, in other words — are not protected under the Fifth Amendment. Your blood isn't, your handwriting isn't. Your fingerprints aren't. Neither are the guns in your home, the tools of your trade, and not your books and your records, which are also the tools of your trade, and in many instances are the very means by which crime is committed.

MR. LAMPF: Your Honor, but there is a theory that — I think that has been espoused by some Courts, by government prosecutors, on the basis that the required records — I don't think —

THE COURT: The required records doctrine is the Shapiro case. That says that where the law requires you to keep records, you lose your Fifth Amendment protections and your Fourth.

MR. LAMPF: We understand that.

THE COURT: This is not the required records doctrine that I'm talking about. You might analogize it to the Marone case, which speaks about the instrumentalities of crime.

MR. LAMPF: Your Honor, I thought your Honor was saying in an IRS case, certainly these records, I thought you were —

THE COURT: No.

MR. LAMPF: — speaking of that.

THE COURT: I don't blame you for thinking that, because I said at one point earlier that IRS often requires these records to be kept. I was really playing your song, talking about impersonal versus personal records, what used to be the test prior to Fisher. That was still the test when Bellis was decided.

Bellis decided that a three-man law firm's records are not personal. But we have come to understand that personal versus impersonal is not the test any longer because it doesn't matter for Fifth Amendment analysis. What I have within me you cannot take from me if it violates the Fifth Amendment, personal or not personal.

MR. LAMPF: Your Honor —

THE COURT: Personal versus impersonal is not a Fifth Amendment test. It may be a privacy test, but not a self-incriminatory test.

MR. LAMPF: Didn't the Court in Bellis specifically avoid the issue of what would have been the rule had it not been a partnership which was, theoretically, in the Court's view, a figment of law that it was not a —

THE COURT: Bellis went further than that for your purposes. In Bellis the affirmative statement was, in fact, made: "This is as far as we will go. Three-man firm is small enough," says Bellis. "That is as far as we go. We draw the line." I'm sure they meant it when they said it, but they didn't keep to it.

And Fisher and Andresen are not three men, but one man, and make it clear that this personal versus impersonal business, stemming all — all of it stemming from notions developed in 1886 in the Boyd case which led to the mere evidence rule. Couldn't get evidence. And then they began to whittle that away by saying, "Well, if the evidence was kind of impersonal evidence, you could get it." All of that has been erased. Rightfully so, in my view.

I do not now mean to comment on whether I think it is desirable or undesirable that these things be gotten. All I'm saying is that the Fifth Amendment doesn't do it. It isn't sensible. It isn't good analysis. It leads only to confusion and chaos, which is what we've had in this area from Boyd through Gouled. And then — Gouled marked a high water mark in this doctrine. Under Gouled you couldn't get anything. It was mere evidence. That was it.

MR. LAMPF: It would be very difficult for me, though, to understand what would be more subject to the Fifth Amendment rights other than maybe an individual's letter to his mother.

THE COURT: It doesn't matter if it was a letter to his mother or his stepmother. If it is a thing written in the past, laying around, it is an object. It is not incriminatory in the sense of being testimonial, any more than the note he wrote to the teller saying, "Your money or your life," even if he never showed it to the teller and what they were looking for was a conspiracy.

It is not that it was shown to anyone. It was not that it was broadcast. It was not that it was held private. It was not that it was in writing rather than it being in numbers, nor even that it is a thing which has printing on a page rather than a gun, which makes it Fifth Amendment. None of these things are under the Fifth Amendment, because none of them are testimonial.

If there is an interest in protecting the letter to the mother, for example, the case you indicate, it is a Fourth Amendment privacy interest that you are talking about, not a Fifth Amendment self-incriminatory interest that you are talking about.

If I am convinced of anything after teaching this stuff for five straight years, studying these cases and reading them every semester again and again, I am convinced of that. There simply is no basis to invoke the privilege against incrimination for the books and records of a business, whether that business is General Motors or one-man business.

MR. LAMPF: General Motors is the corporation. There has been no contention that this is a — this is a sole proprietorship. I recognize General Motors. That is well established. But corporate records are not subject to the privilege.

THE COURT: Why should that be? One man can incorporate himself, make himself into a corporation. Subchapter (s), the whole thing. He makes himself into a corporation only for purposes of limiting his liability to the outside world.

MR. LAMPF: But, your Honor, by doing that —

THE COURT: This whole thing is nonsensical. Why should his records, if they are truly Fifth Amendment records, lose their protection because, to avoid anybody being able reach his own private assets, he incorporates?

MR. LAMPF: Your Honor, by definition, the Fifth Amendment speaks about a person, and the person is an individual.

THE COURT: Still a human hand that wrote the documents. It is still a human being in possession of the document.

MR. LAMPF: Well, I certainly hear you.

THE COURT: Your point is — so the record is clear, your whole point in this is a one-man business; right?

MR. LAMPF: Yes, sir.

THE COURT: Sole proprietorship?

MR. LAMPF: Yes, sir.

THE COURT: He's the only one that owns any interest?

MR. LAMPF: Yes, sir.

THE COURT: What — since, if we have to play this game of personal, impersonal, which I don't think we do, how big is the business? What is his gross a year?

MR. LAMPF: I have no idea.

THE COURT: Do you know?

MR. KLEIN: I do not, your Honor.

THE COURT: Is he here?

MR. LAMPF: No, sir.

THE COURT: He should be here. Does he still run the business?

MR. LAMPF: He is still — he's somewhat active in the business. I don't know.

THE COURT: If he could be active in the business, he could be here, too.

How many employees are there in this one-man business?

MR. LAMPF: I don't know.

THE COURT: Do you have any idea?

MR. LAMPF: Uneducated guess, I would probably think just a few.

THE COURT: Don't be too bold about it.

MR. LAMPF: That's —

THE COURT: How many is "just a few"?

MR. LAMPF: I would think certainly — I would think certainly less than ten.

THE COURT: He has to have payroll records for all these people, W-2 forms. Are they all personal records, too, in your personal versus impersonal analysis?

MR. LAMPF: Your Honor, it is my position that all the records other than those that might be required by some Federal agency of some sort would be privileged.

THE COURT: Because they are personal; is that it?

MR. LAMPF: Yes, sir.

THE COURT: Including records of how much he pays these people; is that right? How about the cancelled checks? Are they personal records, too?

MR. LAMPF: I wouldn't argue that at this stage.

THE COURT: What are the personal records of the business, this one-man business that employs as many as ten people?

MR. LAMPF: Your Honor, I'd like to — I'd like to not brief my case right in front of you right now.

THE COURT: This is your motion to quash, I thought.

MR. LAMPF: Quite frankly, your Honor, I didn't expect a problem such as this.

THE COURT: You mean such as me?

MR. LAMPF: Such as you.

THE COURT: Have I been asking you questions — ha, ha, ha — have I been asking you questions which are inappropriate under the law?

MR. LAMPF: No, sir.

THE COURT: In fairness, I haven't, have I?

MR. LAMPF: No, you haven't

THE COURT: Don't hold me to task, really. I didn't make this motion. You did. I told you that I don't think there is any merit to that position any more today, although I do recognize that under the precedents, until 1976 it was viable. And to the extent it is viable today, it is only because the Courts are so in confusion in this area.

MR. LAMPF: I —

THE COURT: Oh, I state this unmistakably. This dialogue between you and I, if that doesn't demonstrate it, I don't know what else would. Things which have writing on them are no more things — no less or more things than anything else. Things are not protected. That's all that I am trying to show you by this dialogue.

Personal things are not protected, either. Not in the Fifth Amendment. Maybe the Fourth, if they ever carve it out that way. What could be more personal than your own body?

MR. LAMPF: Is that a question?

THE COURT: It had a lilt to the end.

MR. LAMPF: Oh. Well, I've stated my position regarding the motion.

THE COURT: If he's going to go through a contempt proceeding, I want him here. I want to hear him. I want to find out exactly about — I don't think it is germane, but since you think it is germane, we'll have to have an exploration of personal versus impersonal. I'll want him here. I want to know whether or not I can incarcerate him; whether his health is that bad, so forth, because we're going to go ahead.

MR. LAMPF: Your Honor, the record indicates, I think, from the exhibits attached to the motion, that Mr. Spiegel has been — there is enough medical documents that have been presented to show that Mr. Spiegel is in no condition whatsoever to appear in court.

THE COURT: Does he go to work?

MR. LAMPF: I don't know how long he goes to work; how many days a week. I've never —

THE COURT: But he goes; is that right? Have you seen him there?

MR. LAMPF: I, personally, have not seen him at the place of business. I think that, in and of itself, would be a severe problem because of the —

THE COURT: Does he go to work or doesn't he?

MR. KLEIN: The only information the government has, your Honor, is that this subpoena was served on Mr. Spiegel as he entered his offices.

MR. LAMPF: That was at the suggestion that it be served there as against his personal residence on the basis that that would be easier.

THE COURT: Do you want an examination made of him?

MR. KLEIN: Well, your Honor, as I understand it, the Court is about to deny the motion to quash, thereby requiring Mr. Spiegel — I might point out to the Court for the record that the subpoena which the Court is dealing with at the present time is a subpoena issued on October 7th, which requires the appearance of the custodian of records.

THE COURT: Spiegel and any related entity. He's not the custodian of records, is he?

MR. LAMPF: Excuse me?

THE COURT: He's not the custodian of the records, is he?

MR. LAMPF: Are we talking about this particular subpoena?

THE COURT: What else could we be talking about?

MR. LAMPF: I wasn't sure — there is an INC Corp. There is a corporation involved, too. Two subpoenas.

THE COURT: I am talking about this subpoena that you are moving to quash. If he's not even the custodian of the records, then his physical ability to come forward or not is immaterial, isn't it?

MR. LAMPF: Yes, sir. If he's not the custodian.

THE COURT: Are you going to bring those records in here?

MR. LAMPF: Your Honor, I just — I'd like to just put on the record that I have — one of the problems I have — apparently, I have more than one now — is that there is co-counsel in Washington who has been representing Mr. Spiegel before a Senate Subcommittee and another Grand Jury. I would have to consult with that other attorney as to what — he's more familiar with the records, with the medical condition. I think it would be improper for me to —

THE COURT: What I think you ought to do is — we'll set this down for Friday. If your co-counsel wants to come in, let him come in Friday. I think you ought to subpoena in em-

ployees or do the investigation, find out what is going on in that place in terms of his appearances and non-appearances. I think you also have the records in court. I'd like to see the records; how impersonal versus personal the records are, the records called for by the subpoena. I'd like to make an in-camera exposition.

I want your client personally in this courtroom — or, if you take the position that it is inimicable to his health for him to be here, I would like a doctor's certificate. I think the government ought to have the opportunity to have him examined on that issue, as well.

If you are entitled to the Fifth Amendment protections, you're going to get it. If you are entitled not to have to produce these records, you're going to get that, too. If the law requires that they be produced, then no one is to be permitted to flout the law.

If your client can't physically do so himself, we'll make arrangements for somebody else to do it on his behalf.

MR. LAMPF: Your Honor —

THE COURT: But, you know, we have to — if the law requires them to be produced, then they will be produced.

MR. LAMPF: I understand that.

Your Honor, I would just ask — you mentioned Friday. The problem that I may have is counsel is in Washington. I understand he may be unavailable.

THE COURT: Who is counsel in Washington?

MR. LAMPF: Mr. Spiegel's counsel, co-counsel.

THE COURT: What is his name?

MR. LAMPF: Oh, his name is Plato Cacheris, C-a-c-h-e-r-i-s.

THE COURT: All right.

MR. LAMPF: If it please the Court, if this thing could be —

THE COURT: What do you want? To do it on Monday?

MR. LAMPF: I would prefer Monday.

THE COURT: Is that all right with you?

MR. KLEIN: I believe that date is satisfactory to the government, your Honor.

I would like to check my calendar before indicating.

THE COURT: Well, if it is agreeable to both sides, we'll do it Monday. If not, pick a day next week, provided it is not Thursday.

Now, let's go, because I'm not even sure we can even send out Marshals and bring the records in. There is no Fifth Amendment protection. You see, the only difference between a subpoena and a search warrant — do you know what it is?

MR. LAMPF: I'd prefer hearing from you.

THE COURT: They are both really court orders. The difference is the subpoena requires someone to bring them in. The warrant authorizes the government to go get them. And the only difference between the two is that the warrant requires probable cause and the subpoena doesn't.

So, really, you need less of a showing for a subpoena than the warrant.

MR. LAMPF: Okay. Thank you, your Honor.

MR. KLEIN: Your Honor, might I beg the Court's indulgence for a housekeeping matter or two?

As I understand it, the Court is continuing until Monday, November 10th, a hearing on defendant's motion to quash the subpoena?

THE COURT: That's correct.

MR. KLEIN: All right, your Honor. I would point out to the Court that a second subpoena has been served returnable today, and that is a subpoena issued to the custodian of

records of Spiegel Trucking, Incorporated. I have been informed by counsel this morning that he intended to raise the issue of Mr. Spiegel's health in conjunction with that subpoena.

THE COURT: Look, you got no Fifth Amendment claims there, do you?

MR. LAMPF: No, sir.

THE COURT: Is he the custodian of the records?

MR. LAMPF: No. The records have been produced. They have a box of records in the U.S. Attorney's office with the documents.

MR. KLEIN: The government feels that under the circumstances of this investigation, your Honor, that it may be required, although perhaps not desirable to dot the i's and cross the t's, we'd like to have the custodian of records of Spiegel Trucking Company, Incorporated, appear today in the Grand Jury and respond to questions appropriate to a custodian.

THE COURT: In other words, he just needs someone to authenticate they are, in fact, the records. Do you have any problem with that?

MR. LAMPF: No.

MR. KLEIN: The practical problem being, your Honor, that it was represented to me that Mr. Isadore Spiegel, the same gentleman we were talking about with respect to the other motion, is the custodian of the records.

THE COURT: They won't take that position any more. He's too sick to be the custodian. Is that right?

MR. LAMPF: Yes, sir.

MR. KLEIN: So another custodian will appear?

THE COURT: Yes. Don't you understand? The answer is yes.

MR. KLEIN: Thank you, your Honor.

THE COURT: Thank you, sir. Good day.

MR. KLEIN: Good day, your Honor.

THE COURT: Good day to you.

I'm sorry. You just happened to hit somebody who has been studying this for a while.

MR. LAMPF: I understand that.

Thank you, your Honor.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Misc. No. 80-53

IN THE MATTER OF:
THE GRAND JURY EMPANELLED March 19, 1980

Transcript of Proceedings
Newark, New Jersey
November 17, 1980

Before: The Honorable HERBERT J. STERN, U.S.D.J.

Appearances: WILLIAM W. ROBERTSON, United States Attorney,
BY: RALPH JACOBS, Assistant U.S. Attorney,
For the Government

HUNDLEY & CACHERIS, ESQS. (DC)
By: PLATO CACHERIS, ESQ.,
For Irving Spiegel.

THE COURT: Well, we have two different applications, I take it. One is on traditional Fifth Amendment grounds, and the other is a little bit more unusual.

What do you want to do?

MR. CACHERIS: Your Honor, may name is Plato Cacheris. I've not been privileged to appear here before.

THE COURT: I've heard of you. You're welcome.

What do you want to do?

MR. CACHERIS: I'm familiar with what transpired when Mr. Lampf was in court before your Honor last time, and I wanted to make a few observations in that connection.

There were two grounds asserted for the quashing of the subpoena. With respect to the health ground — which,

frankly, your Honor, is much more serious, and, in fact, has become much more serious over the weekend — Mr. Spiegel was, indeed, hospitalized. And in the interim from this morning's recess, I have personally gone to the St. Barnabas Hospital and have seen him there. I represent to your Honor that it is a genuine issue, but if the Court or the government wishes to have him examined, we would have no objection to such an examination to satisfy the Court's —

THE COURT: There is no health problem. The government doesn't need him. All it wants — at least all it says it wants — are the records.

MR. CACHERIS: Right.

THE COURT: Some other person could bring them down to the Grand Jury or the Grand Jury could send the Marshal to get them.

MR. CACHERIS: Your Honor, in connection with these records, I would like to say to you that Mr. Spiegel takes the position — and I think it's a fair position — that he is the sole and exclusive custodian of these records, which, frankly, only leaves the question to be decided by the Court as to whether or not these are the types of records over which a privilege should be maintained.

THE COURT: I'm glad you put it that way.

Let us then break the issue in two. One is the health ground.

MR. CACHERIS: Right.

THE COURT: I think we can agree that is an unusual issue, because it isn't necessary that your client, himself, do anything about these records. I'm sure he has the power to designate somebody else to bring them down. Else, his business could not be kept going.

But this leads us into, really, the heart, I take it, of your motion, which is: Are these records protected —

MR. CACHERIS: That's right.

THE COURT: — by the Fifth Amendment?

MR. CACHERIS: Right. If he were to designate someone else, he would fly right in the face of the Couch case, which I know your Honor is very well aware of. He would be giving up custody.

THE COURT: Not if he does it under the direction of the Court.

MR. CACHERIS: What I would suggest, your Honor —

THE COURT: I could certainly provide that his bowing to judicial direction is hardly a waiver.

THE COURT: He would bow to judicial direction. There is no question about that, your Honor. There is no contention here that he wouldn't. I do not want to destroy whatever privilege he might have. I'd like to preserve it.

THE COURT: I think that you're entitled to that.

MR. CACHERIS: I would suggest, then, your Honor, an in-camera submission of the records to you for the purpose of determining whether you would find that they are of the type that would be privileged.

I am handicapped, your Honor, by the further fact that my client cannot come to court. I can't have him make an explanation to you as to why he thinks these are privileged.

THE COURT: Even if he were here he wouldn't do that. You would do that for him.

MR. CACHERIS: That's correct. That's correct.

THE COURT: I wouldn't expect to hear from him as long as he's represented —

MR. CACHERIS: Fine.

THE COURT: — and so ably represented.

MR. CACHERIS: If your Honor would want some submission in camera with —

THE COURT: Look. So far as I can see, with the possible exception of private diaries — and there is no reason for that — the Supreme Court has come to the conclusion, finally, that records are not testimonial, and, therefore, are not protected under the Fifth Amendment —

MR. CACHERIS: Well —

THE COURT: — thus ending a journey which began with the Boyd case in 1986 and appears to have ended with Fisher and Andresen in 1976.

MR. CACHERIS: I'm glad your Honor put it that way, because I think both those cases have distinguishing features that are not present here.

I am here strictly as an attorney. I'm not here as a custodian. There is no other custodian. Custody still reposes with my client.

Again, for the purposes of this motion, I do have an Affidavit, if you'd like to have it, in which he says he is the custodian of these records.

I still think, your Honor, there is an arguable position — although I'm frank to say to you that it is arguable — as to whether or not any records maintained by a sole practitioner, if you will, are protected. However, that is a point we would like to preserve.

Now, in order —

THE COURT: You may surrender it, it being clearly understood that I have ruled that records maintained through the agents and used in business activities, for certain, have no Fifth Amendment protections.

I will even hold — although I don't have to in this case — that no records in and of themselves are protected under the Fifth Amendment. But we understand each other and it is clear on the record.

Now, we are not talking about private diaries. If there is a particular record which you think is extraordinary in nature

within the saving language at the end of Fisher, where they say, "But maybe not private diaries," although the whole reasoning of the opinion undercuts that. If there is something like that, I'll be glad to take a look at it.

MR. CACHERIS: May I do this, your Honor? I have secured a representative sampling of three or four of the documents, which I can show you today. I'd prefer to do it at sidebar in the sense of in-camera.

THE COURT: Let's go.

MR. CACHERIS: I'd like to make one explanation before that, if I can do that, on the record.

THE COURT: All right.

MR. CACHERIS: I recognize your Honor's direction. I say that with great respect.

In addition to the fact that these may be what you would rule are business records, this man also did a lot of personal things within these records. I just wanted to make that observation. They are not diaries in the sense they were diaries, but personal transactions may have occurred within the records that I think would still be protected.

THE COURT: Let us — I'll take a look at them for you. I don't want the record to appear or you to feel that I haven't done what you think I ought to. But there is nothing testimonial about a record.

MR. CACHERIS: I understand that.

THE COURT: And if the interest here is a privacy interest — that is what I think you are talking about —

MR. CACHERIS: Not really.

THE COURT: — that is not a Fifth Amendment interest. It's a Fourth.

MR. CACHERIS: I respectfully hold onto my Fifth Amendment position, but I will approach —

THE COURT: You are allowed to do that. Should we have a record? We'll see whether we have to.

MR. CACHERIS: Yes, sir. I think that would be appropriate.

MR. JACOBS: Your Honor, for the record, this is to be without the presence of the government?

THE COURT: Yes, that's right.

(The following occurs at sidebar:)

MR. CACHERIS: Your Honor, I have brought with me the sampling of the documents that are in the personal custody of Mr. Spiegel, my client, the first of which is a check which says, "Isadore Spiegel" on it. Below it it says, "Spiegel Trucking Company." It is, in the main, the checks that would be subpoenaed would be exactly with this heading and drawn on the same bank account. That is number one.

There is also, your Honor, what is called a "cash receipts entry." It's a page from his books. In the upper right-hand corner it says, "Spiegel Trucking," and it shows a list of clients who have paid up. "Cash receipts." That is dated January, '75.

Thirdly, your Honor, there is a document dated January, '77, which says, "Spiegel Truck Rentals, Sales," and it lists the sales that the company has gone through.

Finally, there is an account called "Miscellaneous C," which I do not know what it means. I have no way of ascertaining that, particularly with my client hospitalized now, which is also from the records.

In effect, I have taken a page of representative sampling from each and every of the documents that I understand he maintains.

For the record, I would like to tell you that I have been advised — on information and belief, I assert to you — that in the cash disbursements, cash receipts and the checking ac-

count, samples of which I've given you, Mr. Spiegel does a lot of his personal transactions, which I would think would be different than the normal business — a trucker. So you may find a check in there to Joe Blow which is strictly non-trucking, personal.

THE COURT: In other words, he may write a personal check on his company business?

MR. CACHERIS: Not only may, I'm advised he does.

THE COURT: Yes.

All of these checks are disseminated to third parties?

MR. CACHERIS: That's correct.

THE COURT: All of them are negotiated by third parties, at least in the third party's bank —

MR. CACHERIS: That's correct.

THE COURT: — which takes a picture of it?

MR. CACHERIS: That's correct.

THE COURT: And then is transferred through the Federal Reserve System, which also is taking pictures all the time, until it gets back to Mr. Spiegel's bank, where — what do they do?

MR. CACHERIS: They photostat.

THE COURT: They take a picture; every one of those checks being reachable —

MR. CACHERIS: That's correct.

THE COURT: — through any of those banks?

MR. CACHERIS: I don't think they have to be reachable through my client. That is the point I'm trying to make to your Honor.

THE COURT: All right. We understand each other.

You are a fine lawyer. You will preserve your rights. If there is an indictment — I don't know if there will be — if there

should ever be an indictment, you will make a motion to suppress. I hope the law is not that you have to go through a contempt proceeding.

MR. CACHERIS: I don't want to risk that with him. I don't think he's in a position to do that.

THE COURT: You know, even in terms of the monetary fine, I don't know what the law is, but this much I know: You have the benefit of being very clear that you are surrendering these things only because I'm ordering it.

MR. CACHERIS: That's correct.

THE COURT: More than that I can't do.

MR. CACHERIS: Mechanically, your Honor, I don't have them with me, because, again —

THE COURT: Why don't we go back in front of the government and we wont' have to repeat ourselves?

MR. CACHERIS: Fine.

(End of sidebar conference.)

MR. CACHERIS: Your Honor, that portion that we just indulged in at sidebar, with your Honor's permission, will be sealed?

THE COURT: It would have been sealed. I won't make any final decision until I offer you this thought: There is really no point to sealing them, because you'll turn over the material.

MR. CACHERIS: Fine.

THE COURT: You don't agree with that?

MR. CACHERIS: No, sir; I don't agree.

THE COURT: You think it should be sealed?

MR. CACHERIS: No. I don't agree with your turning over the material.

THE COURT: You agree there is no point to sealing it?

MR. CACHERIS: I agree to that.

THE COURT: It is quite clear that you are kicking, screaming and fighting to keep these records out of the hands of the government and that you are submitting only because I'm ordering you to submit.

MR. CACHERIS: That's correct. We are not authenticating them in any fashion, your Honor.

THE COURT: No. Not — what I suggest is this:

Work something - who is he?

MR. CACHERIS: This is Mr. Teltser, my co-counsel, that is asking a question.

THE COURT: I thought maybe he was a member of the firm.

MR. CACHERIS: No sir. Mr. Teltser is from the New Jersey Bar.

THE COURT: Yes. Very nice to see you.

MR. CACHERIS: Mr. Teltser has been a long-time attorney for Mr. Spiegel personally. He is here in case something came up.

THE COURT: Of course. Now, I think what we'll do is work out an arrangement — designate anybody you want to — just to hand the records over. They can come down to the office.

MR. CACHERIS: To your chambers?

THE COURT: No. I'm not involved in this.

MR. CACHERIS: Oh.

THE COURT: The lost lawyers will work you you. They are not impliedly — Mr. Spiegel is not impliedly authenticating the records. If you are worried about that, collect them at your place of business and let them look at them.

MR. CACHERIS: No. Your Honor's expression protects me for that purpose.

THE COURT: Okay.

MR. JACOBS: That's satisfactory to the government at this point, your Honor, with the caveat that we would like to take advantage of Mr. Cacheris' offer to have Mr. Spiegel examined by a physician that the government would select. That, too, we can work out, I believe.

THE COURT: Well, I don't know why you are entitled to it. If he's not going to testify, what is it your business? He's making his records available to you. I don't know why you need to examine.

On the other hand, if you want him before the Grand Jury and he claims he can't go, then maybe you'll be entitled to an examination. Why you want to rummage around his body is beyond me if you get the things you say you want.

MR. JACOBS: Because at this point there are questions about the records that we may be interested in.

MR. CACHERIS: He will not answer.

THE COURT: I've just seen those records. Believe me, you'll have no problem. A couple of journal sheets and a couple of cancelled checks. Your accountants would have no difficulty to that. You couldn't make Mr. Spiegel explain them to you.

You would agree?

MR. JACOBS: He would have the Fifth Amendment privilege.

MR. CACHERIS: Which we insert, your Honor.

THE COURT: Leave it at that. Leave him alone unless you need him produced. Then you wouldn't object to having him examined?

MR. CACHERIS: No, your Honor. Again, to supplement —

THE COURT: We won't do it unless it is clear we have to.

MR. CACHERIS: Correct.

There is a letter from his doctor dated November 7th, which I think the Court received in evidence, on the question of his health.

THE COURT: If you wished to, it would be marked into evidence.

MR. CACHERIS: I would.

THE COURT: If you wished to, it would be marked into evidence.

MR. CACHERIS: I would.

THE COURT: It will be received. Mr. Rizman will mark it for you, or the Deputy Clerk.

Thank you. Have a pleasant day.

(Recess.)

MR. CACHERIS: One other matter. I'm not persuaded —

THE COURT: I didn't give you a contempt proceeding. I gave you the reasonable: Let's do it this way.

Do you want a contempt proceeding?

MR. CACHERIS: No.

THE COURT: Then we'll do it differently.

MR. CACHERIS: I don't want to do it that way, your Honor. I would want to ask your Honor whether your Honor would consider this matter further; whether a stay would be permissible for an expedited appeal.

THE COURT: You have to go through a contempt proceeding to get it justiciable. They won't take it, otherwise. It isn't an order that you can appeal from. I'll have to give you a contempt proceeding. I wouldn't want to do it on the record we got now.

MR. CACHERIS: All right. I will keep the door open and come back, if that's what the desires are, although I'm not representing to you that is what I want.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Misc. No. 80-53

IN THE MATTER OF:
THE GRAND JURY EMPANELLED March 19, 1980

Transcript of Proceedings
Newark, New Jersey
December 23, 1980

Before: The Honorable HERBERT J. STERN, U.S.D.J.

Appearances: WILLIAM W. ROBERTSON, United States Attorney,
By: JOHN KLEIN, Special Attorney,
Department of Justice,
For the Government.

THOMAS R. DYSON, ESQ. (DC)
For Irving Spiegel.

MR. HORN: Your Honor, if I may, I would like to introduce to the Court and move his admission pro hac vice for the purposes of this case Thomas Dyson of the Bars of the District of Columbia and the State of Virginia.

THE COURT: Yes. Mr. dyson is well-known to this Court. He is certainly welcome. Good to see you.

MR. DYSON: Good to see you, Judge.

MR. HORN: Thank you, your Honor.

THE COURT: We have two aspects of this, don't we, really? One is the health aspect. The other is the Constitutional aspect; right?

MR. DYSON: Yes, your Honor.

THE COURT: The health aspect is easy, I would suspect. If, in the end, I ordered compliance, and, if, in the end, there

must be compliance, then it can be done in one of two ways. One way is obviously through an examination, et cetera, so forth. The other would be somebody else going to provide the records. We could explore that. That kind of crosses over into the other one. Right?

MR. DYSON: I have a more recent, if I might call it, medical report, dated December 18th, 1980.

Mr. Spiegel, approximately ten days ago, was operated on and has only recently been discharged from the hospital, approximately last Wednesday or Thursday.

THE COURT: What was he operated on for?

MR. DYSON: His complaint, your Honor, was pain in his side. They found not a growth, but, really, a lump. His appendix had burst, but it had sealed. However, some of the poison, semi-pancreatitis, if you want to call it that, leaked out, caused a mass. They had to take that out.

That was done as recently as ten days ago. He's home convalescing. I have the original here. The government has not seen a copy of it, as I just got it yesterday.

THE COURT: All right. Do you wish to file that?

MR. DYSON: Yes, please, your Honor.

(Document handed to the Court.)

THE COURT: In any event, that doesn't seem to be a long-term proposition.

MR. DYSON: No. I would think the prior exhibits that are in the record, specifically a November 7th, 1980 letter from Dr. Jacobson regarding his heart condition —

THE COURT: That is your main claim?

MR. DYSON: The letter — excuse me.

THE COURT: This could be adjusted by way of time. This is not your problem.

THE COURT: I believe that's so. The letter I have just filed —

THE COURT: Let's deal with the Constitutional question, Mr. Dyson. It boils down to a Fifth Amendment, doesn't it?

MR. DYSON: Yes, your Honor.

THE COURT: You claim that these are his records, and, therefore, a forced production violates his Fifth Amendment rights?

MR. DYSON: In essence, your Honor. Does your Honor care if I just stand here and argue?

THE COURT: Whatever you please.

Now, let me see. Are you relying on the Bellis kind of cases? Is that it?

MR. DYSON: I really am.

THE COURT: Is that the records being — I hate to use words like "personal," et cetera, so forth. I think the law has been literally mangled for close to a century about that. You claim it is like personel records, so forth?

MR. DYSON: Well, I think I was able to read the first transcript in this case, when Mr. Lampf was before your Honor. I got some of the flavor of the Court's feeling about this area of the law.

What — the case I really rely on, purely and simply, is ICC versus Gould, Third Circuit opinion, decided June 30th, 1980. The facts are, I would submit, identical. I do have a witness, your Honor. Perhaps it would be more orderly if I gave you a brief statement of what my position is —

THE COURT: Sure.

MR. DYSON: — then put the witness on to take some testimony.

THE COURT: All right.

MR. DYSON: The evidence will show that Hy Spiegel is a sole proprietor, that Isadore Spiegel has been the sole

proprieter of I. Spiegel for some 25 years, that his personal, private affairs, financial affairs, are intermingled with the business affairs of I. Spiegel; that, in fact, he has paid his personal living expenses from the checking account of I. Spiegel. That over this 25-year period he did not have any other personal checking account. That he has custody of the documents, possession of them; that at all times —

THE COURT: Constructively?

MR. DYSON: Constructively?

THE COURT: Obviously, he didn't have possession when he went into the hospital?

MR. DYSON: True. That's true.

THE COURT: Obviously, he doesn't have possession while he's home convalescing?

MR. DYSON: I think he does.

THE COURT: They are physically in his bedroom?

MR. DYSON: I don't know about his bedroom. I think they are on those premises.

THE COURT: Oh. He had them moved there?

MR. DYSON: No. No, he did not.

THE COURT: Where does he do business out of?

MR. DYSON: The specific address — it's in Harrison.

THE COURT: Not his home?

MR. DYSON: Not his home.

THE COURT: He keeps the records at home?

MR. DYSON: The records called for are from '76 to '79, and he has the records in his possession. As I read Gould, which I'm sure this Court is familiar with —

THE COURT: Don't be so sure. I may not have done as much of my homework as I should have. I'll be glad to consider the case.

MR. DYSON: 629 F.2d, at Page 847.

But the particular section of the opinion that I rely on is Part 4, which begins at Page 857. It is at that point, your Honor, that the Court addresses itself to Gould's Fifth Amendment claim. The facts of Gould; that is, his business background, so on and so forth, I submit are identical with those of Spiegel. It was a sole proprietorship. He had his personal and private affairs intermingled.

THE COURT: Let me ask you something, Mr. Dyson. Suppose Spiegel, to limit his liability, had incorporated, and then, of course, used subchapter (s), you know, to treat it as though it were a personal. Suppose all of the facts before me were exactly the same except that your client had incorporated solely to limit his personal ability. Would that have any impact on a Fifth Amendment claim?

MR. DYSON: To give you the first answer that comes to my mind, I don't know. I never considered it.

THE COURT: When you do consider it, I think you'll probably agree that under the cases since Hale v. Henkle it would have a dramatic impact.

MR. DYSON: It would be a corporation.

THE COURT: It would be a corporation. You would say, therefore, no Fifth Amendment right.

MR. DYSON: What could I say other than that?

THE COURT: Sure, But I think that my little question was meant to highlight my little difficulty with all of this.

MR. DYSON: Well —

THE COURT: That is, that on such a business the mighty rights of the Fifth Amendment should not turn. Not on any sensible accounting of what we are doing.

MR. DYSON: With all due respect to this Court — and I appreciate your view, your Honor — the Third Circuit —

THE COURT: You don't think that's the law?

MR. DYSON: I don't think it's the law —

THE COURT: I'm bound by the law.

MR. DYSON: — in the Third Circuit.

THE COURT: I'm bound by the law in the Third Circuit. I'm bound by the law of the United States Supreme Court, as is the Third Circuit.

MR. DYSON: At Page 858, your Honor, of the Gould opinion, specifically the section delineated A: "It is a commonly-held belief that the modern businessman has little or no expectation of privacy in his business records."

THE COURT: What does expectation of privacy have to do with the Fifth Amendment? That's a Fourth Amendment test.

MR. DYSON: Doesn't have anything to do with it. Doesn't have anything to do with it. The sentence I'm trying to get to is: "Nevertheless, the governing law with respect to the Fifth Amendment protection afforded business records remain as it was succinctly restated in Bellis."

And the second column of the Gould opinion says: "The privilege applies to the business records of the sole proprietor or sole practitioner, as well as to personal documents containing more intimate information about the individual's private life."

THE COURT: What do you do with the Shapiro case, then, if it is a required —

MR. DYSON: Required document?

THE COURT: That was a sole proprietor, too. He was a fruit and vegetable salesman.

MR. DYSON: I'm familiar with the Shapiro case, your Honor.

THE COURT: Listen, you know all the law in this area, Mr. Dyson. You're an expert.

MR. DYSON: No, I don't, your Honor.

THE COURT: Yes you do.

MR. DYSON: No, I don't.

THE COURT: You're an expert.

MR. DYSON: Then, at Page 859, Gould seems to say, implicitly says: They don't really deal with the offshoot, as I call it.

THE COURT: To be sure, the sweeping rule of Boyd has not survived the test of time and unscathed.

Fisher wrote: It hasn't survived the test of time at all. Isn't that what Mr. Justice White wrote in Fisher? Says he: Boyd does not stand the test of time.

MR. DYSON: That's what he says. But, unfortunately, you and I may part company there. I say, of course, as I tried to say in my memorandum, there is still some vitality in Boyd. Gould says the same thing, your Honor. Footnote 22 at Page 859. The last paragraph in the second column.

Yet, while Fisher and Bellis and the cases cited therein may well presage a trend toward the elimination of Fifth Amendment privilege for all business records even when the proprietor is required to produce and thus explicitly authenticate them. Such a final break with Boyd is not for us to make.

As we read the Supreme Court's most recent pronouncements, the Fifth Amendment still affords Gould, be a sole proprietor on the record as we have before us — see Part 1, Supra.

THE COURT: See Page 859. "By contrast, the Supreme Court has held in Andresen versus Maryland that the Fifth Amendment affords no protection whatsoever against the search and seizure of business records."

MR. DYSON: A search warrant. A search warrant.

THE COURT: Yes. But if we supply any analytical logic to this, unless you are talking about the physical act of production —

MR. DYSON: I'm talking about that, too.

THE COURT: Putting that to the side for the moment, if you are speaking about the protected nature of the thing to be gotten, then it hardly matters how you get it. It's either protected or it isn't. Isn't that true?

MR DYSON: That's not what Gould says.

THE COURT: I didn't ask you that.

MR. DYSON: But that's all I can address myself to. We can talk about Schmerber and the other cases.

THE COURT: I'm not talking about Schmerber.

MR. DYSON: All those kind of things.

THE COURT: That is broad. I'm talking about records. Andresen says records are not protected.

MR. DYSON: Fourth Amendment case. Search.

THE COURT: Fifth Amendment case. Read it.

MR. DYSON: Oh, I understand that.

THE COURT: Written by Mr. Justice Blackmun.

MR. DYSON: I understand that. The Fifth Amendment was interposed.

THE COURT: That's what they decided on.

MR. DYSON: The other grounds are in this case that these are tax records. These are Mr. Spiegel's tax records. That issue —

THE COURT: The law in this area has been completely — I would like to use a more colloquial term — used since 1886.

MR. DYSON: Boyd?

THE COURT: When Boyd was written. Everybody thought they finally straightened it out in 1968 in Warden v. Hayden. Objects are not protected under the Fifth Amendment. Only testimony is protected under the Fifth Amendment. That's

what happened under Warden versus Hayden when you put the sword to the mere evidence rule. The mere evidence rule was an outgrowth of the Boyd case, limiting the kind of things which could have been written under any circumstances, even though they looked like Fourth Amendment cases. But the Fifth, they were held to violate the self-incrimination provisions of the Constitution, and, therefore, were unreasonable. Warden versus Hayden put an end to that. Still, it lingered on. Not in the area any more of blood-stained shirts and shoes and socks, but in the area of records. That doctrine was eroded from at least three different directions. You had the Mirrone case coming at it from the notion of instruments of a crime. You might use that here. Instruments of a crime. They were talking about payments to a light company. Those kinds of records. Books of account of an illegal business or a business run in an illegal way. That says those are not protected under the Fifth Amendment, for they are instruments of crime. But that wasn't so satisfactory. Then they had to go at it from another direction, starting with the Fleischman case and the White case, growing into the Bellis case. It became personal records versus impersonal. Most records of account are impersonal records, whether held by an individual or by a corporation, unless personal versus impersonal means something else. But maybe it means the numbers of people who hold them. Why that should have any bearing under the Fifth Amendment defies definition. You are either incriminating yourself with records or not if they are personal records or impersonal records. The note which you hold in your pocket which says, "Your money or your life" is a writing. Who amongst us would say that is protected under the Fifth Amendment against seizure? No one. Yet, it is a personal record. Does the fact if someone has ever seen these have any bearing? Some cases say it should. As a matter of logic, it doesn't make any sense. The fact that you have chosen to reveal to another something doesn't mean that you can be required to reveal it to the government; you, yourself. And, yet, even if that were the test, most of the records that we are talking about, cancelled checks, so forth, so on, have gone out to the world and been photographed, photocopied in banks.

Not only the writer's bank, but probably the payee's bank, as well. Endorsements. There may be twenty pictures of the thing floating around out there.

Then we have the great Bellis case, a three-man law partnership. We were told by Mr. Justice Marshall that drew the outermost limits of the inquiry. Couldn't go any further.

Then we had Andresen and Fisher, which were one-man businesses, and we went that far without any trouble at all. In the name of heaven, why for Fifth Amendment purposes does it matter if a record, you see, is in the possession of one man, two men, three men, four men? It shouldn't. No reason.

MR. DYSON: But —

THE COURT: Mr. Justice Marshall cites with approval an opinion by the Southern District of New York in the case of Slutsky. Do you know that Slutsky case?

MR. DYSON: Yes.

THE COURT: There they suppressed. They said: No, you can't have these records. It's too small. Three-man law firm in Bellis said: You could have the records.

Do you know who Slutsky was? I have the honor of knowing firsthand who Slutsky was. Slutsky ran a hotel known as the Nevele. That hotel employed literally hundreds of kids. Catered to tens of thousands of guests over a season. This Court had the honor of being a bellhop in that great institution and can tell you firsthand that it's a mammoth enterprise versus a three-man law firm. We are doing a crazy jig here.

MR. DYSON: We may be. But can we agree or disagree, if the case may be, on what Gould says?

THE COURT: Well, that's your best agrument. I'm bound by whatever the Third Circuit says —

MR. DYSON. You are.

THE COURT: — whether I agree with it or not. Doesn't always appear that the Circuits are as bound by the Supreme

Court whether they agree with it or not, but that's besides the point.

MR. DYSON: And Gould to me, I think, clearly says that the same protection for business papers applied to Gould as he claims for his own personal papers. The case says that.

THE COURT: I don't think any papers are protected.

MR. DYSON: I know what you say.

THE COURT: That's what Mr. Justice White said in Fisher, Mr. Justice Blackmun said in Andresen and what Mr. Justice Brennan implied when he put the sword to the mere evidence rule in Warden versus Hayden. Things, things, pieces of things, aren't protected.

THE COURT: Of course, even in Fisher they left the issue —

MR. DYSON: The act of production is different. In that they heavily relied, I think, on an opinion by Judge Gibbons of this Circuit in the underlying Fisher case.

You know, Fisher was taken on certiorari from the Third Circuit. It was. If you read the Circuit's opinion in Fisher, you'll find there was a very careful opinion by Judge Gibbons in that case.

MR. DYSON: But, really, Gould is my argument.

THE COURT: I understand.

MR. DYSON: It is the argument. In Fisher, so, to finish that thought, they did leave open the question of if those records had been tax records.

THE COURT: Who will know if we can't see them? Do you want to submit them to me in camera?

MR. DYSON: I understand you've seen a portion of the records when Mr. Cacheris was before you.

THE COURT: He gave me a sample of each different kind.

MR. DYSON: I would hope to —

THE COURT: I'm not ordering you to.

MR. DYSON: I would hope to be able to demonstrate to this Court through this brief witness what, in fact, these records and documents are, tax records.

THE COURT: Do you want to put a witness on the stand? Go right ahead.

MR. DYSON: Yes. As the Court well understands and well understands and appreciates what Gould says —

THE COURT: I don't know if I do. I really ought to read the opinion with a little more care than I have.

MR. DYSON: I would respectfully suggest you could start at Page 857.

THE COURT: That's exactly what I have done. I have adopted your suggestion. I'm right there. Just grant me one minute. I'll be right with you.

(There is a pause in the proceedings.)

THE COURT: By the way, quick question. Assume — assume that there were probable cause to see these records. Assume. And assume I were satisfied there was probable cause and issued a warrant. And assume I was right, that there is probable cause. Could the records be obtained by search warrant?

MR. DYSON: I think they could.

THE COURT: What?

MR. DYSON: I think they could.

THE COURT: I feel that's the end. But we'll see.

(There is a pause in the proceedings.)

THE COURT: You do, in this case, Mr. Dyson, make a blanket Fifth Amendment assertion so far as all records are concerned, do you not?

MR. DYSON: I have an argument on that.

THE COURT: But you do that, don't you?

MR. DYSON: No. I'm going to say no.

THE COURT: You are refusing to give any records aren't you?

MR. DYSON: We are refusing to give any records. Do you want me to address myself to that at this time?

THE COURT: Sure.

MR. DYSON: The subpoena calls for specific documents. I say that that would take us out of a blanket.

THE COURT: You mean because you are answering a specific request?

MR. DYSON: Specific request.

THE COURT: With specific notice?

MR. DYSON: That's right. Then I would go —

THE COURT: Ha, ha.

MR. DYSON: — from there, from there, your Honor, to Hoffmann versus the United States.

THE COURT: Well, that's the case which deals with whether or not the Judge can take a look?

MR. DYSON: No.

THE COURT: Whether or not you have to give a reason?

MR. DYSON: That's right. Hoffmann and Malloy.

THE COURT: But if I'm bound by Gould, as you say I'm bound by Gould, if they condemn in Gould —

MR. DYSON: The blanket.

THE COURT: — the blanket —

MR. DYSON: And you hold it's a blanket —

THE COURT: What do I do then?

MR. DYSON: Then I think we have to wait until Mr. Spiegel —

THE COURT: Refuses?

MR. DYSON: — until Mr. Spiegel is physically able to come in and be specific. I had planned to make that argument over an hour's time, but it only took about ten seconds. I say it's not a blanket.

THE COURT: This case could really continue for years and years, couldn't it?

MR. DYSON: I would like to get the 5:23 Eastern back to Washington, yes.

THE COURT: I don't mean today. I mean we could continue it for a year from today.

MR. DYSON: This case?

THE COURT: Today might seem like a year. That is not what I meant.

MR. DYSON: I was here at eleven o'clock.

THE COURT: I was here earlier waiting. I was waiting for the government just as you were waiting for them.

So you would say that part of Gould is wrong which says that he must demonstrate that the documents — "These cases establish," says the Court, "that Gould may claim the Fifth Amendment protection if the Fifth Amendment is applicable at all." Footnote, see Part 4(b) Supra.

Let's leave that.

MR. DYSON: I don't say that part of the opinion is wrong.

THE COURT: Wait. I didn't read the part yet. "These cases establish that Gould may claim the Fifth Amendment protection if the Fifth Amendment is applicable at all for specific documents or categories of documents which he can demonstrate to the Court might tend to incriminate him."

MR. DYSON: I agree with that.

THE COURT: You say you do have to demonstrate.

MR. DYSON: I think I can demonstrate it in an argument here in front of you today. If I can't, then I suggest —

THE COURT: I don't think that — listen, you know that's not the law, that you have to make any demonstration. All you have to do is invoke the privilege.

MR. DYSON: That is what I think the law is.

THE COURT: That portion is wrong in Gould, you say. I know you want to cling to this like a lifesaver. Since the time of Willy's case, when Chief Justice Marshall wrote that all you can do is invoke the privilege unless the Court can say —

MR. DYSON: Unless it is clear.

THE COURT: That's right.

MR. DYSON: Unless it is clear.

Now, I think — no. I think the Court is correct.

THE COURT: All right. Then you will assume the burden of demonstrating that the records can incriminate you. Unless you satisfy, that you agree, you must turn them over.

MR. DYSON: Pursuant to what the law is, which I say, is Hoffmann versus United States.

THE COURT: Not Gould?

MR. DYSON: I think Gould is correct in this area when they say if somebody asks a witness — if the Court asks a witness: Who won the San Diego — who did they play last night?

MR. HORN: Pittsburgh.

MR. DYSON: I forgot — Pittsburgh game last night?

THE COURT: I see you have an officianado of the sports with you.

MR. DYSON: I've lost interest since the Redskins went down.

In any event, if an absolutely —

THE COURT: There are those of us who feel they played so well.

MR. DYSON: The Redskins?

THE COURT: Giant fans.

MR. DYSON: How about paraphrastic? If somebody asked that question — and it obviously couldn't. It was impossible for it to call for an incriminating answer — that is one thing.

THE COURT: My dear Mr. Dyson, there is no such question and no such answer. Suppose it were an investigation into the fixing of a game?

MR. DYSON: True. True. But suppose it was asked of a person —

THE COURT: Who knows what that person may have done in that game?

MR. DYSON: I agree. I agree with that.

THE COURT: The problem with Chief Justice Marshall's test in the Willy's case is there is never a time when a Judge can say unequivocally, there is no possible way the answer can incriminate you.

MR. DYSON: I think that's true, virtually.

THE COURT: I'm aware of no reported case in the last fifteen years where a Judge has written that he may.

MR. DYSON: I saw it happen in this courtroom ten or twelve years ago.

THE COURT: Well, it wasn't a reported case.

MR. DYSON: It was not a reported case. Judge Shaw in Mayor Addonizio.

THE COURT: Well, obviously, different times. Perhaps government counsel was overly persuasive.

MR. DYSON: They must have been. Perhaps the Court knows who government counsel was.

THE COURT: I don't bother with those things.

MR. DYSON: But, in any event —

THE COURT: Actually, I don't think Addonizio was ordered to answer any questions. He blurted out an answer.

MR. DYSON: I think he did blurt it out. He was being hard pressed.

THE COURT: But he was not ordered.

MR. DYSON: By the Court.

THE COURT: Was he ordered?

MR. DYSON: We're on the record. I might as well say it. I think his counsel didn't rush to his aid.

THE COURT: Was he ordered to answer?

MR. DYSON: Very close to it. Very close to it.

THE COURT: What is there about the American adversarial system which trains us all never to answer the question?

MR. DYSON: I remember that. I was incredulous that so much —

THE COURT: You weren't there.

MR. DYSON: I was there.

THE COURT: You were physically there?

MR. DYSON: I was physically there that day. Why, I don't really know.

THE COURT: You were retained at that time?

MR. DYSON: Yes. I think it was in the course — must have been in the course of the Grand Jury.

THE COURT: Now I know there was a conspiracy. There wasn't an indictment yet.

MR. DYSON: I didn't have anything to do with Addonizio.

THE COURT: I know.

MR. DYSON: But I was a spectator that day.

THE COURT: Just happened to be around?

MR. DYSON: I just happened to be around trying to learn something, your Honor.

THE COURT: I don't disagree with what they say about a blanket.

All right. We're having some fun. I have read this case. It's very enlightening and illuminating and aids us a great deal. Of course, we're in an area of expanding law here. We are all trying to do the best we can.

I want to apply the law as the Circuit thinks it is. They want to apply the law as the Supreme Court of the United States thinks it is. Part of the trouble, it keeps changing on us. Every case we mentioned reflects some change not just on the facts, but the legal principle on the facts.

You talk about Boyd, talk about Warden versus Hayden. You talk about Goulet. You talk about Bellis. You talk about Fleischman. You talk about Andresen. You talk about Fisher. Every one of these cases is a new war and the ripples are going all over the place.

From where I sit, my best reading of all the law on the subject is that the Fifth Amendment does not protect objects. Tangible, physical objects are not within the Fifth Amendment. My best reading of the law is that it doesn't matter whether those objects are human blood, human voice, human fingerprints, human hair, human records, records made by humans, human handwriting; that these are things which are things.

My best understanding is that the Fifth Amendment protects only against the forced divulgence of testimony. I, therefore, hold that the Fifth Amendment does not cover books and records. It may well be that the outermost limits of this doctrine that we shrink from is in the area of diaries. It may well be that we shall say one day that diaries are not reachable. But if we say they are not reachable, we will say it for the real reason; that is to say, because of privacy under the

Fourth Amendment. Not because of self-incriminatory suggestions under the Fifth.

There may well be things which are so personal, things which are so private, that whether or not, more particularly, even in spite of the cases, they are not self-incriminatory under the Fifth Amendment because they are not things and not testimony. Notwithstanding that, it is not reasonable to be able to reach them because it violates the Fourth Amendment.

It, therefore, is clear to me, as my best intellect gives me to see the light, with due regard for all the opinions that I have read in this area — and I have read a lot of opinions in this area — with due regard for all that, I hold that objects, including written objects, past written objects are not protected under the Fifth Amendment.

There may well be Fifth Amendment protection against the forced delivery of it under certain circumstances. There may well be Fourth Amendment protections against anybody being able to see them in the interest of privacy, for example. But not Fifth Amendment. For it is plain to me, Mr. Dyson, that if the records, these same records are not protected under the Fifth Amendment from warrant, then, absent the act of production, what all that means — and I think you know what that means —

MR. DYSON: Yes.

THE COURT: — they cannot be protected from the Fifth Amendment by subpoena. They are the same records. It is the same amendment.

Now, where does that leave us so far as your client is concerned? The way I see it is this: Assuming you have given me a representative — through Mr. Chakeris — a representative sample.

MR. DYSON: I believe that's true.

THE COURT: Then I can say with perfect equanimity that these records are not of the kind, they are not private in the

sense that I believe it is unreasonable for the government either to go and look at them or to compel someone to show it to you. They are not accounts of intimate relationships with people. They are not things which, weighing under a balancing test, this society today would say, you know, ought not to be shown, or, in the jargon of the times, people have a reasonable expectation that no one will ever see at all.

Quite the contrary, they are ordinary bills and checks. While some of them may have been paid for things which were not to do with the business, none of them were held in the bosom. Not the kind of things that are.

The balancing test I speak of now, Mr. Dyson, is a proper test under the Fourth, not under the Fifth. The Fifth is absent. There is no balance to be struck. You cannot be compelled to incriminate yourself. Not ever. It is not sometimes. Not if the need is great it can be overriden. Never.

The Fourth Amendment is different. Balancing test. What is reasonable, what is not reasonable. You get need. You look at probable cause, so forth.

So it is not unreasonable, then, under concepts of privacy, for the government to see these documents. It is not prohibited under notions of self incrimination for them to see them, because they are only documents. They are only things.

That leaves us with the last issue, Mr. Dyson. That is, how they get to see them. That is the act of production argument left open by Fisher. More fully explored in Judge Gibbons' opinion in Fisher, as I say, in the Court of Appeals. It is an argument which has some appeal to you.

MR. DYSON: I addressed that issue probably more in my memorandum than I really did Gould, quite honestly. I had not seen — I knew of Gould, but I had not seen the physical opinion.

THE COURT: All right.

Well, I really hadn't focused on it myself. I recognize there is some language that is not in perfect accord with what I just said.

MR. DYSON: A lot, if I may respectfully say so.

THE COURT: There is a lot of language, there is. I think we are all groping to the light. I don't think the last word was written in this Circuit or anywhere else. I don't think I am violating the law of this Circuit; I really don't. If I am, I will be told.

MR. DYSON: I think you are, of course.

THE COURT: You are paid to think that, if you will forgive me, with all due respect to you.

Now, let's talk about the act of production. I think when it all gets said and done that will be ruled to be a non-issue the next time the Supreme Court of the United States addresses it. For, as Mr. Justice White has pointed out in the Fisher case, if the act of authentication; that is to say, the fact of bringing forth were violative of the Fifth Amendment, you could not compel anybody to give a handwriting exemplar because no greater act of authentication could possibly be done. Or provide a blood specimen, urine specimen or give the piece of the ends of hair, so forth, so on. So I doubt very much — I doubt very much that the mere act of giving the neutral thing; that is, the thing which is not protected under the Fifth, that the act of giving is itself protected under the Fifth. For if that is going to be the law, you cannot compel anybody to give anything.

MR. DYSON: Well —

THE COURT: However, it seems to me with due regard for the physical condition of your client now and in the past and in the future, and with due regard for the fact that: Why should we test these issues if it is not necessary to — Judge Garth makes provision, it seems to me, in this opinion for on-site inspection, doesn't he?

MR. DYSON: I don't recall that.

THE COURT: One thing we could do. We could simply have this good witness, here, who will tell us about all these documents, be the one to give them to the government. Would you accept it from him?

MR. KLEIN: We would, your Honor.

MR. DYSON: Let me say this, your Honor: I don't want to mislead this Court in any fashion whatsoever.

THE COURT: I know we'll go through a contempt proceeding.

MR. DYSON: Sure.

THE COURT: You have to do that in order to make the issue. I just want it to be clear that this Court could work out a method of production which would not jeopardize your client's health and which would not in the act of production even get him involved in the act of production. And there is no question about that, is there, Mr. Dyson?

MR. DYSON: If this Court held that?

THE COURT: I mean, physically, we could work that out if he were amenable.

MR. DYSON: Very practical — if he were amenable to it? But on the basis of the argument, obviously, that I've made to you —

THE COURT: You made it that we can't get it at all.

MR. DYSON: That's right.

THE COURT: Assuming you are wrong in that, we could get them in a way which would neither jeopardize his health or cause him to be the one to produce it; right?

MR. DYSON: As it has unfolded here, with the government agreeing with you that they would accept them from someone else.

THE COURT: You would agree with what I have said, then, in that latter respect?

MR. DYSON: That you would be circumventing —

THE COURT: The act of production problem?

MR. DYSON: The act of production problem? No. I don't think you would. I don't think — I don't think you'd be circ — the only thing you'd circumvent —

THE COURT: Is his act of production?

MR. DYSON: — is the health problem.

THE COURT: And the incriminatory aspect from him in the act of production?

MR. DYSON: What I would argue would be testimonial?

THE COURT: That's right.

MR. DYSON: Yes. These are the records.

THE COURT: We would avoid that problem?

MR. DYSON: You would avoid that.

THE COURT: Yes.

MR. DYSON: Sure you would.

THE COURT: All right. So then we are left solely with one issue; shaping this issue for your appeal.

MR. DYSON: No. Excuse me, your Honor. Excuse me, your Honor. I misspoke myself. You would avoid the health issue, but you still, in effect, would be — still Mr. Spiegel would, implicitly, if not directly, be making the act — still making the act of production and still the authentication.

THE COURT: Even if this good man sitting there would do it?

MR. DYSON: Let me try to finish this thought before I lose it.

THE COURT: Sure.

MR. DYSON: Still it would be testimonial in its character because the government, Mr. Klein, would say to whomever — let's put it that way, to whomever — "You got these records from Mr. Spiegel, did you not? They are the records of" —

THE COURT: That's right. Suppose they did? And suppose this man — what is his name? I don't want to keep calling him "this man."

MR. DYSON: Mr. Rosen.

THE COURT: Suppose Mr. Rosen says, "Yes, I did get them from him"?

MR. DYSON: There you have it. I say that's an act of production by Spiegel.

THE COURT: Mr. Rosen is familiar with the records, I gather?

MR. DYSON: Familiar with them? He has worked with some of them.

THE COURT: That's why he's here, to tell us about them?

Let the record say there is a vigorous up and down movement of the head that is usually associated with a "yes."

MR. DYSON: Yes.

THE COURT: So he knows enough of the records simply to go and fetch them, does he? If I were to turn to him right now and say to him: "I command you, Mr. Rosen" — don't answer for him — "I command you, Mr. Rosen, to go and bring me those records," he knows where they are?

MR. DYSON: I don't know whether he does or not, to be honest.

THE COURT: "I tell you they are now in Mr. Spiegel's house." Suppose I said that to Mr. Rosen? "Mr. Rosen, go get me those records you've been working with all these years." He could do that, couldn't he?

MR. DYSON: Except Mr. Spiegel would say to Mr. Rosen when he got there, "I'm not going to give them to you because they would be a violation of my Fifth Amendment rights."

THE COURT: What is the difference between a warrant, which would permit us to take them from his hand, and a subpoena which you say does not for Fifth Amendment purposes?

MR. DYSON: Because the cases make the distinction.

THE COURT: For Fifth Amendment purposes?

MR. DYSON: The cases. You got Andresen.

THE COURT: No. For Fifth Amendment purposes, what is the difference?

MR. DYSON: From a sense of pure logic?

THE COURT: Yes.

MR. DYSON: I have a problem with that.

THE COURT: Yes.

MR. DYSON: But I can only go with what the cases say. I really don't — I appreciate and I understand, I think, everything the Court has said. But how you can escape — if you will. I don't mean that word in any harsh sense — what Gould says is beyond me.

THE COURT: Mr. Departmental Lawyer, Mr. United States Attorney, however you are properly referred to, do you have probable cause?

MR. KLEIN: I haven't made that assessment, your Honor.

THE COURT: You choose, instead, to proceed by subpoena?

MR. KLEIN: That's correct, your Honor.

THE COURT: I gather this has been — from some of the papers I've read, formal papers filed in court — this has been a very lengthy investigation?

MR. KLEIN: Not to date, your Honor. It only started several months ago.

THE COURT: Extensive background here.

MR. KLEIN: You mean attempting to get these particular documents commenced with the subpoena some time in October.

THE COURT: That's when this first began?

MR. KLEIN: The subpoena was issued, I believe, the 7th day of October.

THE COURT: How did this come to the attention of the Grand Jury?

MR. KLEIN: The entire investigation was initiated upon referral to the Department of Justice of an allegation and preliminary investigation conducted by the General Service Administration.

THE COURT: I don't know how any more. I think they were in a set of papers I've seen about some Congressional inquiry.

MR. DYSON: The Childs' Committee. GSA, Art Metal.

THE COURT: Why don't you want to tell me about it?

MR. KLEIN: The Childs' Committee is not the source of this particular investigation. I suppose in the sense that the Childs' Committee looked at Art Metal. Therefore, people would believe that the particular allegation which the Grand Jury is currently investigating came from --

THE COURT: What is the date of the allegation? Not the date you heard of it. If there is a crime, according to your best information, when was that crime committed? During what period of time?

MR. KLEIN: I couldn't give it to the Court exactly. It's been a while since I looked at those documents. I think it was in '78. It might have been in the latter part of '77, but I think the year '78 would hit the middle of it.

MR. DYSON: Might I? Excuse me. The Justice Department Task Force — I, of course, can't speak for Mr. Klein. I don't know what Mr. Klein specifically does, except he is with the Justice Department Task Force investigating the GSA fraud.

The whole situation involving Art Metal and everything else has been knowledge of mine for two years, at least, in the newspapers.

THE COURT: I remember reading some things about it myself. It caught my eye because I think it was a Newark firm. They work out of Newark.

MR. DYSON: At least in this area, if not in Newark proper. It may well be in Newark proper, Art Metal.

THE COURT: I don't remember the details.

MR. DYSON: It may be in Newark proper, but it is certainly adjacent to Newark, Art Metal. But — and Spiegel, too.

THE COURT: Are you prepared to tell us anything about the nature of this investigation?

MR. KLEIN: I prefer not to, your Honor. Of course, I'll comply with whatever instruction the Court had.

THE COURT: I'll tell you what is on my mind. By the way, these were the same records utilized, I take it, in whatever dealings he dealt with the government; is that right? Among these records are records reflecting the dealings with the government?

MR. DYSON: I — I don't know what the Court means by that. I'm not sure.

THE COURT: If this sole proprietorship, during the year '77 and '78, did business with the government, then any records reflecting those business dealings would be amongst those records which he is asserting privilege on?

MR. DYSON: If that's true, right.

THE COURT: I'll tell you what is on my mind, Mr. United States Attorney. I want to provide a proper record for the United States Court of Appeals, for it is plain to me not only from what I've heard here, but from what I've heard before. But somehow I get the sense from not the newspapers, but the court papers that I've read that this gentleman is very adamant about not releasing these documents, and I want to know whether there is an issue of time involved. I mean, after all, one could go even through a contempt proceeding, argue to the last breath about possible ambiguities in the law, then,

even if you lost the contempt proceedings come back and say, "All right. Now we'll comply, but no punishment, because, after all, we had a right to litigate this." But the only trouble would be the statute of limitations would have run.

MR. DYSON: I don't really think — if I may use a colloquial expression, the name of this game —

THE COURT: Is there any possibility of that?

MR. KLEIN: I can't say in good faith, your Honor, at this point that that would be a realistic possibility. Of course, depending upon how lengthy the proceedings are resulting in the final acquisition of the documents.

THE COURT: All right. I just wanted to have some picture. It is very hard. We stumble around. A complete curtain is around it.

MR. DYSON: It is something I would be interested in. I agree with you.

THE COURT: All right. Do you want to present a witness?

MR. DYSON: Yes, your Honor.

THE COURT: Go ahead.

MR. DYSON: Mr. Rosen.

IRVING ROSEN, being first duly sworn, testifies as follows:

THE CLERK: State your name and spell your last name.

THE WITNESS: Irving Rosen, R-o-s-e-n.

DIRECT EXAMINATION BY MR. DYSON:

Q: Mr. Rosen, would you give us your home and business address for the record, please?

A: My home and business address is 14 University Road, East Brunswick, New Jersey.

Q: What is your business, Mr. Rosen?

A: I'm a Certified Public Accountant of the State of New Jersey.

Q: And for how long have you been a Certified Public Accountant, sir?

A: Since 1956.

Q: And that continues to the present day?

A: Yes.

Q: During the course of that time, have you had as a client a Mr. Isadore Spiegel?

A: Yes, I have.

Q: And have you done work not only for him, but for his sole proprietorship, I. Spiegel?

A: Yes, I have.

Q: I assume the answer in that question, but do you know of your own personal knowledge if the business entity, I. Spiegel, is a sole proprietorship?

A: Yes, it is.

Q: Do you recall approximately when you began work for Mr. Spiegel?

A: Some time in 1957 or 1958

Q: So you would have been working for him approximately 22 or 23 years?

A: Yes.

Q: During the course of your work for him, did you prepare tax returns for him as an individual?

A: Yes, I did.

Q: Is it a fair statement that the books, records and other financial data of the sole proprietorship I. Spiegel make up a part of the tax records that you used to prepare Mr. Spiegel's tax returns?

A: Yes. It's a fair statement.

Q: Do you know, Mr. Rosen, whether or not Mr.Spiegel had — well, excuse me. Let me withdraw that.

Has there been, during the years that you have been familiar with Mr. Spiegel and I. Spiegel, a bank account in the name of I. Spiegel?

A: Just the business account, so far as I know.

Q: Do you know of your own personal knowledge whether or not Mr. Spiegel has ever had a personal account in addition to I. Spiegel?

A: Not to my knowledge.

Q: In the preparation of Mr. Spiegel's tax returns, did you come to learn that he paid personal bills and expenses out of the I. Spiegel account?

A: Yes, he did.

MR. DYSON: Excuse me. Would you indulge me a minute, your Honor.

THE COURT: Sure.

(There is a pause in the proceedings.)

Q: Would it be a fair statement, Mr. Rosen, that to the best of your personal knowledge Mr. Spiegel exercised control and dominion over the business entity I. Spiegel?

A: He had complete control of it.

MR. DYSON: That's all the case I have, your Honor.

THE COURT: Yes, sir.

Any cross-examination?

CROSS-EXAMINATION BY MR. KLEIN:

Q. Mr. Rosen, are you familiar with the subpoena which is at issue here today? Have you read it?

A. No, I haven't.

MR. KLEIN: I have no further questions, your Honor.

THE COURT: I have a few questions.

EXAMINATION BY THE COURT:

Q: When — I gather you had to prepare his personal income tax returns?

A: Yes.

Q: You had to work off these records?

A: I took his books and records and prepared a return for him.

Q: Did you reconcile the accounts?

A: I didn't reconcile the accounts.

Q: How many checking accounts were there?

A: One, so far as I know. There is a payroll account. I didn't reconcile cash.

Q: Did he give you the payroll account?

A: I didn't work on the payroll account over the last 15 years.

Q: Were there receipts?

A: There is a sales journal, cash disbursements journal and cash disbursements journal.

Q: A payroll journal?

A: I never saw a payroll journal. The payroll went through the cash disbursements book.

Q: Listed there; is that it?

A: I think they had an automatic payroll system and just a new check was put through.

Q: Did they have a bookkeeper?

A: They had a bookkeeper, yes.

Q: Full time?

A: Full time.

Q: How many employees did they have during the period that you did the work?

A: No idea.

Q: No idea?

A: No idea. I never did the payroll return.

Q: You would see their names listed in the return?

A: No. They had a check made out to "Payroll."

Q: He would pay them in cash?

A: No. What happened was you made out a check to "Payroll." It was given into another checking account that was a payroll account. Individual checks were made out. Whatever the total of that was, the total was added up and that was the total of the checks.

Q: I see now. Now I understand. In other words, there definitely were two accounts. There had to be.

A: Yes. A payroll account, too.

Q: From the payroll account he would have to write the checks?

A: Yes.

Q: Were there any authorized signatures on the account with which you dealt?

A: The only one I saw was his name.

Q: How about the payroll account?

A: I never saw a payroll check.

Q: What was the name of the bookkeeper?

A: A number of them. A Vicky Brant. A Rose Brightman. One by the name of Frances whose last name I don't know. And, prior to that time, he had other people.

Q: Let me see if I understand how this would work. He delivered the books to you. You took them to your home, or did you do it at his place of business?

A: Sometimes I did it at his place of business. Sometimes I did it at my home.

Q: When you did it at his place of business, would he just make a little office available for you?

A: Yes. He had a nice-sized office.

Q: Would you work out of his office, or did he make a separate room available?

A: No. I worked out of his office — excuse me. His office? It wasn't his office. It was a bookkeeping office.

Q: In other words, you went into the bookkeeper's office?

A: Right.

Q: You would then, as you needed a record, you would just go and get it. Is that right?

A: They were given to me?

Q: Were you able to go get them yourself, or did you have to ask the bookkeeper?

A: Actually, I had to ask the bookkeeper for them.

Q: You asked the bookkeeper and the bookkeeper would get it for you?

A: Yes.

Q: They were kept on the place of business every time you were there?

A: Yes.

Q: Now, when you made out these tax — so when you went to the place of business you must have had some estimate of how many people were working there?

A: I just saw the people in the office.

Q: Sure.

A: Five or six people in the office. Aside from those I didn't know how many.

Q: What was the nature of the business?

A: Trucking.

Q: Trucking?

A: Yes.

Q: Did he own trucks?

A: He owned trucks.

Q: Did he have drivers working for him?

A: He had drivers working for him.

Q: How many trucks did he own at any given time? What is the largest number of trucks?

A: He may have had 30 or 40. I really don't know.

Q: At one time?

A: Yes.

Q: He also employed the truck drivers to man those trucks?

A: Some he employed, yes.

Q: What was his gross receipts, let's say, in the year 1978?

A: I don't know that.

Q: Approximately?

A: I have no idea.

Q: '77?

A: '77, I gather, it would be about 800,000, 700,000.

Q: Gross receipts?

A: Gross receipts.

Q: Is that a good year or a bad year?

A: I go by good years on whether he earned a net profit or not.

Q: Is that a large gross receipts or a small one for him?

A: For him it was above average.

Q: Above average.

Now, would you prepare any kind of informational return, or just a personal return?

A: A personal return. I would prepare — I would prepare tax returns.

Q: For who would you prepare those?

A: For the company that had trucks.

Q: It was a separate company?

A: This particular company had trucks. I prepared a highway use tax.

Q: In other words, that was required by who? The State?

A: The Federal —

Q: Federal Government. You would prepare one in his name as a company —

A: Yes.

Q: — for the Federal Government?

A: Yes.

Q: What would that report show?

A: It would show how many trucks he had that were subject to highway use tax and made certain weight requirements.

Q: Obviously listed the number of trucks, how much each one weighed and you paid the tax?

A: Yes.

Q: What other returns would you prepare for him?

A: For him personally?

Q: Or for the company?

A: I went — worked for him. He had the company and he had other companies that he was the stockholder of.

Q: Did he keep all those records together?

A: Yes.

Q: And you prepared all of those returns?

A: Yes.

Q: He kept them in this one office?

A: Yes.

Q: At this Spiegel Company?

A: Yes.

Q: What companies were those?

A: Spiegel Trucking, Inc. There was a Transpet Company, T-r-a-n-s-p-e-t.

Q: Were these corporations?

A: These are two corporations, right. There was an I&L Trucking. The records were in a warehouse which was located on this same lot that the trucking company was at.

Q: Did he have employees who were employed by more than one of these companies? In other words, were there common employees among any of these employees?

A: I don't think so.

Q: Do you know?

A: I don't know.

Q: Who was the bookkeeper for the corporation? The same bookkeeper?

A: Same bookkeeper except for I&L.

Q: So, in other words, the corporation and Spiegel Company shared a common bookkeeper?

A: Share common bookkeepers, plural.

Q: Bookkeepers?

A: Right.

Q: In other words, as the years went by they would change?

A: Right now they have more than one. As the business got bigger they had more bookkeepers.

Q: How many bookkeepers are there now?

A: I think there are four.

Q: Four for the company?

A: For everything.

Q: All four work on everything?

A: Yes.

Q: When did Mr. Spiegel take to keeping the records at home?

A: I have no idea.

Q: You never went there to do the work, did you?

A: Never went to his house to do the work.

THE COURT: Any questions, Mr. Dyson?

MR. DYSON: No, your Honor.

THE COURT: Government?

MR. KLEIN: No, your Honor.

THE COURT: Thank you very much.

THE WITNESS: Thank you.

(Irving Rosen excused.)

MR. DYSON: I have no additional —

THE COURT: No other witnesses?

MR. DYSON: — witnesses.

THE COURT: Well, this now enables me to make an even more elaborate ruling. I can now do what Judges love to do. I can avoid all the grave Constitutional questions. I don't have to run to the edges of Gould.

Based on what I've heard in this courtroom, this is a typical Bellis situation. It may well be that Mr. Spiegel chooses from time to time to do some of his business in a corporate name and some of his business as a sole proprietorship. It is perfectly evident from the testimony of this witness, who I believe, he commingles the records, commingles the employees, and, at least for purposes of this hearing, the most critical of employees, the four bookkeepers, were required to keep track of all these records.

If we are then left to personal versus impersonal, these are impersonal. The fact that now, besieged as he is by government investigation, he takes to his bed and with him brings his records into his house, that doesn't draw a congenerous circle around them and make them sacrosanct and safe from investigation.

Moreover, I find from the evidence before me, undisputed in this record, that the normal place for these records is in the firm.

It may well be that Mr. Spiegel is seeking to create a Constitutional problem in the act of production by taking them from their usual place of housing, where they are attended by his four bookkeepers, and bringing them, instead, to his home, where, of course, he is the only one who can reach them.

The answer is easy. He can return them to the place where they were. If he wishes to avoid being the one either to bring them to the Grand Jury or if he be too ill to do that, to permit someone else to enter his home to collect them and bring them to the Grand Jury, then he may simply either himself, or, if he be too ill, that one of his four bookkeepers or his accountant may take those records and put them back where they are usually kept; that is to say, in the place where his accountant usually works on them.

Then the government may, if the government chooses to, subpoena any one of those bookkeepers to bring forth those records.

You have those options. The one option that you may not have is simply to keep them in his house and draw an iron curtain around them.

Now, do you want to go up? You'll have to frame this in terms of a specific ruling and specific order, and so forth.

MR. DYSON: Excuse me, your Honor. May I just address myself very briefly to what you said?

THE COURT: Yes.

MR. DYSON: And so the issue, respectfully, with it?

THE COURT: Of course.

MR. DYSON: You have made a factual finding, if I understand what you said correctly, that implies in some nefarious way Mr. Spiegel has taken the documents. That is something that he never did before.

THE COURT: We don't have any evidence of that.

MR. DYSON: No. I'm saying —

THE COURT: I have the evidence of his accountant, that his accountant, every time he wanted records and needed records, went to his place of business. He has four bookkeepers.

MR. DYSON: Right. Those are the current records. It may well be that any use for those current records ended at the close of the year, when Mr.Rosen —

THE COURT: I have no testimony in that regard.

MR. DYSON: One way or the other?

THE COURT: That's true.

MR. DYSON: One way or the other.

Mr. Spiegel could very easily, in the normal course of his business and activities, have taken old — to me, I am using the word "old" in the sense they were no longer active in that year — to his home.

THE COURT: It would make no difference in the long run.

MR. DYSON: I just wanted to make that point on the record.

THE COURT: It may be. It may be. I stand by what I said.

MR. DYSON: I want to make that point. I didn't understand the last statement your Honor made. Do you want to take this up?

THE COURT: No. You do?

MR. DYSON: I do.

THE COURT: I need to frame this, because the Circuit will want to have a precise thing that I'm ordering. Normally, if there is going to be cooperation, I could work out a methodology. But I can't do that here. I'm willing to order any one of the following things to avoid any Fifth Amendment implication in the act of production. That aspect of it, you know, which deals with the act of production.

I'm willing to have a bookkeeper go to his home if he's too ill to do it, to bring the records back or bring the records here. He needn't do it.

As far as any records which are there — what years are you asking for?

MR. KLEIN: From January 1, '75, through December 31, 1979, your Honor.

THE COURT: Why would December 1, records be at his house? They are at his house, too?

MR. DYSON: '79?

THE COURT: Yes.

MR. DYSON: To my knowledge.

THE COURT: Those are old records, too.

MR. DYSON: I would assume that all the accounting work — here we're at the end of '80.

THE COURT: What fiscal year is he on?

MR. ROSEN: Calendar year.

THE COURT: On a calendar year?

MR. ROSEN: On a calendar year.

THE COURT: Was his return due in April?

MR. ROSEN: April 15th.

THE COURT: Did you do — did you do this tax return for the year 1979?

MR. ROSEN: The last tax return I did was for the year 1977.

THE COURT: Who did them after that?

MR. ROSEN: I have no idea.

THE COURT: None?

MR. ROSEN: I have no idea who did it.

THE COURT: Were you ever contacted by another accountant?

MR. ROSEN: I was contacted by an attorney who told me to give them whatever figures I had.

THE COURT: Give you what?

MR. ROSEN: Whatever figures I had I gave to an attorney.

THE COURT: What figures?

MR. ROSEN: Whatever they wanted for the tax returns.

THE COURT: What attorney was that?

MR. ROSEN: Mr. Doyle.

THE COURT: Is he a tax lawyer?

MR. ROSEN: I gather he is.

THE COURT: All right. Thank you very much, sir.

Well, in any event, the records, not being personal ones, did not become so when he took them away. Whether he took them for the purpose of attempting to make them personal, as this Court has found, or took them for some other reason, as counsel suggests, is a matter of no legal moment.

MR. DYSON: I agree with that.

THE COURT: So we stand by where we are. We could do it under Bellis. We could do it under Fisher. We could do it under Andresen. We can even avoid the problem of the act of production. I will work out any way of producing them that you wish. But you are going to take the position that we may not have them at all; isn't that true?

MR. DYSON: That's true. And, further, because of the Fifth Amendment, and, further, that any method of working it out to avoid the act of production, I take the position that you don't avoid the act of production.

THE COURT: We could avoid it very simply. Tell him to put it back where he took them away. The government will not watch him. The government will give a subpoena to the bookkeeper, which they are perfectly prepared to do.

That would avoid the act of production, wouldn't it?

MR. DYSON: I understand what you are saying, Judge.

THE COURT: You're not saying it wouldn't —

MR. DYSON: I'm not saying it wouldn't —

THE COURT: — avoid it?

You agree — what I want to find out from you, Mr. Dyson, you're going to seek review. You're going to say I was wrong. At least let me know where I'm wrong and where I'm right now.

MR. DYSON: Well —

THE COURT: Am I correct that will avoid the act of production on him?

MR. DYSON: No.

THE COURT: I'm wrong?

MR. DYSON: If I understand what you are saying —

THE COURT: Tell him to put it back in the company.

MR. DYSON: That is not where he keeps the records in the normal course of his business.

THE COURT: Not the testimony of the accountant.

MR. DYSON: Suppose at the end of the year he took the records out?

THE COURT: I have no such testimony or evidence.

MR. DYSON: As I say, one way or the other. Mr. Rosen's testimony, as I understood it, was limited to the fact that during the active year he would go to Spiegel's office.

THE COURT: All right, Mr. Dyson. I'm persuaded that there is nothing I can do to avoid the problem, largely because Mr. Spiegel does not wish to avoid the problem. I have found and you have even agreed with me that the fact that he took them away one day did not make them into personal records if they weren't before he took them.

MR. DYSON: It doesn't change the nature of what the situation is.

THE COURT: By the same token, it logically follows, if the records were subpoenable in the office, they didn't become unsubpoenable because he took them away.

MR. DYSON: But if they were only under his control and dominion —

THE COURT: In the office?

MR. DYSON: In the office.

THE COURT: Clearly, the testimony is not that.

MR. DYSON: At the end of a particular year — I'm sure that the government could subpoena today the 1980 records.

THE COURT: Well, Mr. Spiegel, they haven't — you got me going. Mr. Dyson, they haven't done it. They subpoenaed the records they have. The records were clearly subpoenable before your client took them away. They were not under his exclusive dominion and control, but were under the control of numerous people — at least four that I know of, the fifth if the accountant's testimony is correct, and I believe it to be — some of whom were corporate employees as well as Spiegel employees.

As I say, the issue for me is clear. This man is adamant that these records will not be produced. I don't think it is arguable any more. I am, in any event, offering to Mr. Spiegel, through you, any way of bringing forth those records, including some neutral person to convey them who will not be prosecuted nor whose act, you know, will not be used against him. And I think the government will even agree, if I asked him, that they will not be asked, "Did you get them from Mr. Spiegel," so there won't be that problem.

Do you agree with that?

MR. KLEIN: We'll agree with that, your Honor.

THE COURT: So even that —

MR. DYSON: Excuse me.

THE COURT: I'm sorry

MR. DYSON: I'll have to take it up with Mr. Spiegel.

THE COURT: Even that obviates the problem.

MR. DYSON: Excuse me?

THE COURT: That obviates the act of production problem.

MR. DYSON: I have to take it up with Mr. Spiegel. You say it is not arguable?

THE COURT: To me it is not.

MR. DYSON: How can you say, respectfully, your Honor —

THE COURT: Every time somebody says to me "respectfully," do you know what happens? They tell me I don't know what I'm talking about in a nice way.

MR. DYSON: You know I never say that.

THE COURT: But in a nice way. You're about to do that. Go ahead.

MR. DYSON: How you can say —

THE COURT: It is not arguable —

MR. DYSON: — in the light of Gould is beyond me. You have your view, your Honor, of what the law ought to be, but it's not what the law in the Third Circuit is today. Whether or not you'll be borne out this year or next year — I don't presume to say —

THE COURT: You may be right or you may be wrong on that, but that observation really doesn't apply any more.

MR. DYSON: It applies in this sense.

THE COURT: I'm not talking about what I talked about before.

MR. DYSON: No.

THE COURT: I'm using the traditional test of Gould and all the others.

MR. DYSON: That's right.

THE COURT: The Third Circuit takes one look at the factual situation here. I have very little doubt they will say these records must be turned over. And delay can be costly in these investigations.

MR. DYSON: Excuse me? I didn't hear you.

THE COURT: Delay can be costly in these investigations.

MR. DYSON: But certainly —

THE COURT: Somebody, you know, has to bear the risk.

MR. DYSON: But certainly the Court would agree that my position is a reasonable one.

THE COURT: Mr. Dyson —

MR. DYSON: I'm saying it's a reasonable argument.

THE COURT: — do I have to pick between my fondness for you and my quest for the truth?

MR. DYSON: I would certainly hope not.

THE COURT: Than don't make me do it.

MR. DYSON: I'll have to take it up with Mr. Spiegel, your Honor.

THE COURT: I think you should. I hope you'll make clear to him in my view, after hearing this evidence, a refusal under all circumstances and by all means to produce those records or to make it possible for them to be produced is an act of outright contempt, not arguable, taken only for purposes of delay, for I would guarantee that the act of production does not incriminate him as an act.

I am as clear as I can be that on the state of this record under traditional Bellis-type tests the records, themselves, are not protected. So I really believe that the ball is in his court.

Of course, if he wishes to test the accuracy of, the correctness of these rulings, he may. He has a right to. But at least from me, in the event of a summary affirmance, which I expect there to be, he can expect nothing.

MR. DYSON: I understand your position.

THE COURT: What is a reasonable time for a response?

MR. DYSON: Excuse me. Let me say one other thing before I get to that.

I don't think — I disagree with your lumping it under Bellis.

THE COURT: Okay.

MR. DYSON: I don't think it is that situation under these facts and this record.

THE COURT: Right. It is closer, really, to the case of — the one we had here. Judge Whipple held him in contempt. The predecessor of Bellis. They relied on the —

MR. HORN: Mal Brothers.

THE COURT: That's right. They claimed they didn't even have the records. You would be amazed how they produced them after they went to jail.

MR. DYSON: I remember that.

Speaking for my own personal considerations, now —

THE COURT: What is reasonable? If you got a problem, I'll work with you.

MR. DYSON: The week of January 5th.

THE COURT: I don't think that's unreasonable. After Christmas and New Year's.

MR. DYSON: After New Year's.

THE COURT: Do you have any problem with that?

MR. KLEIN: I'm not sure what the Court is ordering.

THE COURT: During that week he will notify us when he will produce them. If not, an order will be entered adjudging his client in contempt. I may take dramatic action immediately.

MR. DYSON: I would hope, your Honor, if we come to that —

THE COURT: In the meantime, if the answer is no, I will want an immediate medical examination.

MR. DYSON: By a government physician?

THE COURT: Is that agreeable to you?

MR. DYSON: No problem whatsoever with that.

THE COURT: Agreeable to you? In other words, during the week of January 5th, if the answer is no, there will be an

order judging him in contempt immediately. There will be supplementary proceedings to determine what sanctions should be imposed upon him immediately. I may, if he is physically able, incarcerate him. I may simply fine him X amount a day. I am not likely to stay.

Is that agreeable to you?

MR. KLEIN: Obviously, the government will comply with the Court's order, your Honor.

THE COURT: I didn't ask you that. Of course you'll comply. I'm asking you whether they are reasonable orders. I wouldn't ask you if they were not reasonable.

MR. KLEIN: I'd like to state this for the record: The government's subpoena was issued to the custodian of the records of I. Spiegel, who I understood it was to be a sole proprietor. It was not directed to Isadore Spiegel.

The motion to quash filed by Mr. Teltser, Esquire, the first attorney, and then Mr. Dyson moved, they represented to the Court that Mr. Spiegel was a sole proprietor — excuse me — the sole custodian of the records of that corporation — of that proprietorship.

The government didn't subpoena Mr.Spiegel. It simply subpoenaed the custodian of the records.

THE COURT: Government, what are you trying to do?

MR. KLEIN: Your Honor, I was informed after the second hearing in this case, this being the third one that has been held, that —

THE COURT: I have some flue. I have a terrible flu. I'm getting dizzy.

MR. KLEIN: Deteriorating, I think.

THE COURT: I'm getting confused. Sometimes I think one side of the one and sometimes the other side.

MR. KLEIN: I understood at the second hearing — I could not be at that hearing — my understanding, talking with government counsel who was here, that the Court ordered the production of those documents. Subsequent to that —

THE COURT: There is a possibility of compliance here. Don't you hear him? He may want to comply.

MR. DYSON: There is a possibility, your Honor.

THE COURT: I think he may. I know this man and he knows me. All he's asking for is a little time. You may get all your records in the week of January 5th. You know, a few days thereafter. If not, everything is going to happen very quickly after that.

MR. DYSON: May I ask the Court for some guidance?

THE COURT: Sure.

MR. DYSON: How would you like me to notify both the Court —

THE COURT: By telephone.

MR. DYSON: By telephone — any Mr. Klein?

THE COURT: Or come on in. Better yet, you better come in. We'll make a record. Come on in, because it will happen right then.

MR. DYSON: I'll come in the week of the 5th.

THE COURT: If that's convenient to you.

MR. DYSON: January the 5th?

THE COURT: Why don't we do it on January 5th?

MR. DYSON: I have to be in New Orleans that day. The 7th?

THE COURT: I can't. The 9th?

MR. DYSON: Fine.

THE COURT: The only time. I have to be up at Harvard then.

MR. DYSON: Ten or eleven o'Clock?

THE COURT: Make it easier on yourself. You are flying in from Washington.

MR. KLEIN: That's correct.

THE COURT: Would eleven-thirty be better?

MR. KLEIN: Better.

MR. DYSON: Eleven-thirty on the 9th.

THE COURT: I urge you to comply.

MR. DYSON: I hear you. Believe me, I do, your Honor.

THE COURT: It won't pleasure me, but I'll do it. All right.

MR. KLEIN: Your Honor, there will be a contempt hearing on the 9th if there is no compliance?

THE COURT: There will be an order. You had the hearing.

MR. DYSON: You'll enter a contempt order on that day?

THE COURT: Bring it with you. Brint it with you. As a matter of fact, if you know in advance that you are not going to comply, give us the courtesy, since we are putting this off for your personal convenience, tell the government you are not. Arrange for the medical examination so we can get a lot of things done. They you won't have to keep coming back.

MR. DYSON: I don't see why I couldn't be in touch with Mr. Klein on the 6th.

THE COURT: Agreeable to you?

MR. KLEIN: Fine, your Honor.

THE COURT: Work it out perhaps before the 9th, the medical exam. Dr. Sanford Lewis is an excellent doctor in this area. A heart man, so forth, so on.

I hear somebody sick in the back of the courtroom.

MR. DYSON: I heard his name many times myself.

THE COURT: Have you?

If you do not want him, you don't use him. This man is from out of town. He doesn't know the names.

MR. DYSON: It has been a pleasure, your Honor. I don't know what else we can do.

THE COURT: Do you understand what I mean? You'll be all set.

MR. KLEIN: I understand what you are saying.

THE COURT: You do not look enthused.

MR. KLEIN: Your Honor, I was going to preface my remarks with, "with all due respect."

THE COURT: I –

MR. DYSON: No better way to start.

MR. KLEIN: In light of your earlier comments, I won't.

THE COURT: What did I do wrong? Tell me.

MR. KLEIN: It appears that the custodian of the custodian of the records of Spiegel has been ordered at the conclusion of the prior hearing to produce these documents.

THE COURT: Do you want me to issue the contempt order right now?

MR. KLEIN: That was the government's wish.

THE COURT: Is that the pluperfect subjective that you are under?

Do you want the order for contempt right now?

MR. KLEIN: Yes. Or, at the very least, your Honor, issue an Order to Show Cause for the 9th day of January.

THE COURT: Young man, I apparently lost my ability to articulate right. On the 9th day he's going to tell me those records will be in your possession or very shortly thereafter or within a matter of hours his client will be held in contempt. If you can get him examined before the 9th and he's able to, the client will be in jail. At the very least, his client will have a substantial fine imposed on him.

Good day.

MR. KLEIN: Good day, your Honor.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Misc. No. 80-53

IN THE MATTER OF:
THE GRAND JURY EMPANELLED March 19, 1980

Transcript of Proceedings
Newark, New Jersey
January 9, 1981

Before: The Honorable HERBERT J. STERN, U.S.D.J.

Appearances: WILLIAM W. ROBERTSON, United States Attorney,
By: JOHN KLEIN, Special Attorney,
Department of Justice (DC)
For the Government.

THOMAS R. DYSON, ESQ. (DC)
For Irving Spiegel.

THE COURT: Is your client in contempt of court, Mr. Dyson?

MR. DYSON: Yes, your Honor.

THE COURT: I thought so,

We had a call this morning, Mr. Klein — Your name is Klein?

MR. KLEIN: That is correct, your Honor.

THE COURT: You just advised us something to the effect an appointment had been made with Dr. Lewis. Your client decided he would not go. Is that it?

MR. DYSON: That's true. I'd like to say something about that. What the Court recites is a fact.

THE COURT: Sure. I want to hear what you have to say.

MR. DYSON: Would you like me to address that?

THE COURT: Say whatever you like, but please address that, too.

MR. DYSON: I'll be very brief, your Honor. We had an exhaustive discussion and argument on the 23rd of December. It took some hour and a half, hour and forty-five minutes. At the conclusion of that I was to report back to Mr. Klein on Tuesday, which I think was the 6th, as to whether or not there would be a voluntary production or any type of resolution.

What I reported to Mr. Klein and I now report to the Court is that there will be no voluntary production, that Mr. Spiegel continues —

THE COURT: When you say "voluntary," you mean whether there will be compliance with the order? It is not voluntary, in any case; right?

MR. DYSON: True, true. Right.

Mr. Spiegel continues to rely on what I have asserted or argued to the Court is his Fifth Amendment right.

Now, I might not have this exactly right, but, basically, what had happened was Mr. Klein at that point said, "Well, I'm going to set up an examination." Whether I said it to him at that time or had said it in a previous conversation, I do not know. But I did say to him, "Mr. Spiegel will agree to be examined by any doctor in New Jersey or New York or this area other than Sanford Lewis." There is a reason for that. I just didn't pull that out of the hat.

Mr. Klein called me back that afternoon, or, in any event, early the next morning and told me he had set up an appointment at 10 a.m. yesterday, is my recollection, with Sanford Lewis. And I reiterated to him at that time, "Well, that may be a problem. I'll have to talk to" — he called me back Tuesday afternoon, because I got back to him on Wednesday. In fact, he was here in Newark by that time. And he said — well,

I finally reported to him that he would not present himself for examination by Sanford Lewis. Wednesday afternoon.

Is that correct, Mr. Klein?

MR. KLEIN: That's right.

MR. DYSON: Basically, the reason for that, your Honor, is this: It's twofold, actually. We take the position that Dr. Sanford Lewis is an internist, not an expert in cardiology.

Approximately three years ago, during the course of a civil — some civil action here in New Jersey in the Newark area, the opposing side from Mr. Spiegel had him examined by Dr. Lewis. Now, I'd like to state that I'm not a doctor but I think what I'm now going to say medically is correct. As a result of that examination, Dr. Sanford Lewis concluded that Mr. Spiegel had two blocked arteries but that he was physically able and capable to testify in that particular proceeding, whatever it was. As I said, it was a civil action.

He did so. He testified. Immediately after that he was hospitalized. It was determined that he had six blocked arteries, if I'm accurately giving the physical description, and was hospitalized for a substantial period of time.

Under those circumstances it creates, in the serious condition that Mr. Spiegel is in now, stress of its own and anxiety to even think about being examined by Sanford Lewis. But he will agree, does agree, has agreed to be examined by anybody else that the government may select.

In addition to that, Mr. Spiegel was subpoenaed by the Senate Committee, what I term the "Child's Committee." I don't know.

THE COURT: Some time ago?

MR. DYSON: Couple of years ago. Some eighteen months ago. Child's Committee was investigating GSA fraud.

He or his counsel at that time, who was Mr. Cacheris —

THE COURT: You mean before the Child's Committee?

MR. DYSON: Before the Child's Committee — informed the Court — informed the Committee, whatever appropriate representative, that Mr. Spiegel's medical and physical condition did not permit him to testify.

THE COURT: So he couldn't go to Washington before the Senate?

MR. DYSON: He couldn't appear and testify before that Senate Committee which I term the "Child's Committee." They wanted to have him examined and selected, through whatever process they use, Sanford Lewis.

THE COURT: That's the second time?

MR. DYSON: He wasn't examined this time.

THE COURT: Oh, everybody went to Lewis?

MR. DYSON: Apparently.

Mr. Cacheris advised the Committee, and I can't address the specifics of that because I don't know exactly what happened, that Mr. Spiegel would take any other doctor in this area.

THE COURT: But not Lewis?

MR. DYSON: But not Lewis, and they agreed. And he eventually was examined by a Dr. Yablonski, who is an expert in cardiology at Bergen County Hospital in Hackensack, I think. And Dr. Yablonski concurred with Mr. Spiegel's doctors that he could not, that, indeed, it would be a serious threat to his life to have to testify. So they used him.

So, it's against that backdrop history that Mr. Spiegel —

THE COURT: Let me see if we can't, like Alexander, cut the Gordian knot. In one respect his physical condition is academic, isn't it, because he's not producing these documents whether he's able to physically or not?

MR. DYSON: That's ture. It might go to —

THE COURT: The punishment?

MR. DYSON: True.

THE COURT: But not the fact of production?

MR. DYSON: No.

THE COURT: All right. So let's put that to the side for a moment. He's got these documents in his house?

MR. DYSON: That is my understanding.

THE COURT: I say they must be turned over to the government. If he says he's too sick to bring them to the government, I say the government shall go to him and take the documents there.

MR. DYSON: I understand exactly what you are saying.

THE COURT: But he won't permit that, either.

MR. DYSON: No.

THE COURT: That is contempt of court, isn't it?

MR. DYSON: You are ordering production of the documents and he is refusing.

THE COURT: The answer is yes?

MR. DYSON: Answer is yes.

THE COURT: All right.

Now, we have a host of new problems, as I understand the law.

MR. DYSON: True.

THE COURT: We have to decide what kind of contempt it is, what the punishment is, and, aside from that, whether I can simply send the Marshals down there to get the documents. That is to say, to take Mr. Klein — not Klein — Mr. Spiegel and his documents and to bring them before me with appropriate medical safeguards. Ambulance, doctors; right?

MR. DYSON: Let me add one more thing at this point.

THE COURT: Yes.

By the way, do we have a Marshal here, Mrs. Smith?

THE CLERK: No.

THE COURT: Get a Marshal down.

MR. DYSON: He is ill today, and, as of yesterday, he's got the flu and is running a fever, your Honor.

Now, of course, I'm sure that this Court understands — or appreciates, I should say. Not understands — that I intend to immediately appeal whatever is the final — I think we are all agreed that now, as I stand in front of your Honor, Mr. Spiegel is in contempt of this Court. I intend to appeal immediately. I have, I hope, a complete set of papers in order to accomplish that.

Mr. Spiegel is attempting to assert a Constitutional right, which I believe he is properly doing at this time in that he is correct.

Now, I'm certainly not going to reargue that before the Court. My position obviously was on the 23rd and still is that the holding, the ruling, the interpretation of the law by this Court is in direct conflict with the law in the Third Circuit, which we beat to death, and a later case, August, 19th case, Johannsen, in which the facts are slightly different. But they reiterate and underline and reinforce their holding that the Fifth Amendment right as to documents, things, if you will, is not only viable, but extremely important. They explicitly reject —

THE COURT: You know that my decision, which was tentatively on that ground to begin with, was amplified by the factual matrix which was produced before me. I'm sorry.

MR. DYSON: I was nodding my head.

THE COURT: If I had to bite the bullet on it, I would have done so. But, given the facts as I heard them, under the traditional Bellis, White, Fleischman line of cases, Malanga in this Circuit, the records are not personal, thus not protected.

I remain of the view that the distinction between personal records and impersonal records are quite mysterious for purpose of the Fifth Amendment, but, nonetheless, working within that framework, it could only be characterized, in my view, as impersonal records. So, therefore, are exempt.

Be that as it may be, what I want to propose to you is a sensible solution guaranteed to protect your client's rights, but also to preserve the records. He's got them in his possession. We are fighting at every barrier, at every ditch here.

MR. DYSON: Yes.

THE COURT: I want those records safeguarded. I'm actually prepared to go through the examination process, and so forth and so on. At least turn over the records, turn them over under seal, if you will have it, until the Court of Appeals determines it if the government has no objection to that, which will preserve both your disclosure, on the one hand, from sight, but keep the records intact, on the other. But, as I say, he simply cannot in a willful manner draw a congruous circle around himself, his house and records, sit there, confessing to be too ill to do anything except to go to work sometimes.

MR. DYSON: Not really, your Honor.

THE COURT: Sometimes he does.

MR. DYSON: The situation which I really think ought to be clarified, where he accepted service of the subpoena at — I'll call it his work site, his office, if you will, whatever — that was done pursuant to the direction of his attorney. He showed up there that day.

THE COURT: If he can do things at the direction of his attorney, he can do things at the direction of this Court.

MR. DYSON: I'm certainly not going to argue that.

THE COURT: But, as I say, I want to preserve your right to appeal. I want to preserve the records. Bring the records down to court. Put them under seal in the Clerk's office. I'm still

going to go through a contempt proceeding. I'm going to find him in contempt. I have to make it justiciable for your appeal; right?

MR. DYSON: Correct.

THE COURT: The question of punishment is a different question; right?

MR. DYSON: Yes.

THE COURT: So that is what I would like to do if we can work it out.

MR. DYSON: That's possible. I can certainly find that out in a matter of minutes.

Let me ask the Court this: Obviously, I think that I have a good faith position. It's arguable, so on, so forth. If we were able to work out that solution, would the Court be willing to stay — what am I asking the Court to stay? I'm asking the Court to stay not its holding of Mr. Spiegel in contempt, but the execution, I suppose. The execution of the contempt order until I had —

THE COURT: I will find him — what I will do is find him in civil contempt.

MR. DYSON: Civil contempt?

THE COURT: I will penalize him a fine. So much a day.

You go litigate in the meantime. I will then, at the same time, convene criminal contempt proceedings against him. To that end he will have to be examined, so forth, so on — we'll work it out — to see what he's capable of doing, because I believe him to be in both criminal and civil contempt. The civil contempt part of it you can appeal.

MR. DYSON: Immediately?

THE COURT: Immediately. As long as the records are here, we can then discuss questions of purging or not purging later.

MR. DYSON: I beg your pardon?

THE COURT: We can discuss questions of purging —

MR. DYSON: Purging?

THE COURT: — or not purging later, depending on what happens on the appeal. At least the records will be here. Depending on whether the government is prejudiced by the delay, et cetera, so forth.

This will create, on the one hand, justiciable question. It will be on appeal. On the other, I would not have to do what I think may well be necessary to do in this case; just to take those records. In no instance would I give them over to the government immediately until the Court of Appeals has passed on it, but I want to take them out of his hands.

MR. DYSON: I appreciate what the Court is saying.

THE COURT: Is that an unseemly solution to you, Mr. Klein?

MR. KLEIN: The government, of course, would ask for the imposition of a sanction.

THE COURT: I'm going to.

MR. KLEIN: The Court said it would be imposed and not stayed. There would be a fine imposed under the civil finding of contempt?

THE COURT: Then I would also entertain a criminal proceeding against him. I don't know whether that makes any sense, given his health. I will see.

MR. DYSON: I honestly represent to the Court I don't think it does. I don't think there is any question about his physical —

THE COURT: I'll have to see.

MR. DYSON: Obviously, you have to make the determination.

THE COURT: But if he gives the records over — well, frankly, if he gives the records over, I'm not even sure I would go into the criminal area. If we get all the records under civil contempt and the Court of Appeals says we should have it — look, he'll have to pay whatever fine there is.

MR. DYSON: Pardon me? Would you stay the execution of that pending appeal?

THE COURT: What would your position be on that?

MR. KLEIN: Of course, the government would ask the Court not to stay: The idea of the civil fine and sanction is to coerce the production in this case, compliance with the Court's order.

THE COURT: I will not stay. You may get a stay from the Court of Appeals.

MR. DYSON: In that regard, before I forget what I'm about here —

THE COURT: But if he doesn't do it, I may send the Marshals out. I may take the records. I will certainly institute criminal proceedings against him.

MR. DYSON: I understand that. I understand that. Housekeeping details. To my knowledge, there exists in this case no written order.

THE COURT: I know. Because we've been waiting to see whether you will comply.

I'll sign the written order. You'll tell me — this is a formality.

MR. DYSON: Formality. But it's something that I, hopefully, can accomplish in a moment of moments today.

THE COURT: Sure.

MR. DYSON: I have an order prepared —

THE COURT: Good.

MR. DYSON: — denying the original motion to quash.

THE COURT: Right.

MR. DYSON: I have an order prepared denying the motion for reconsideration.

THE COURT: Right.

MR. DYSON: I have an order prepared holding Mr. Spiegel in contempt —

THE COURT: Right.

MR. DYSON: — adjudicating him in contempt —

THE COURT: Right.

MR. DYSON: — with a blank space on it for any — the penalty, et cetera.

THE COURT: Normally, we have — I don't have any idea about his monetary worth, so forth. I don't know exactly what fine to impose upon him.

MR. DYSON: Of course, at this point we are only dealing with civil contempt.

THE COURT: It is supposed to be coercive. Ten dollars is coercive to one person and ten thousand wouldn't be to another.

MR. DYSON: In any event, I have that order.

Then I have a Notice of Appeal. —

THE COURT: Sure.

MR. DYSON: — and a check. I understand I need all this certified by the clerk.

THE COURT: They'll do it all for you.

MR. DYSON: Right.

Then I have a motion for a stay of the order, this and that. So I'd like to have that taken care of, if I could.

THE COURT: Sure. Have you shown them to your —

MR. DYSON: No, I have not.

THE COURT: Why don't you give a set to us? Do you have a set for us?

MR. DYSON: Yes.

THE COURT: Show a set to him.

Do you want to call your client, too? Is that it?

MR. DYSON: Yes. Hopefully, I have this in order.

THE COURT: Because if he doesn't want to do it, then I'll hold him also in criminal contempt, order his arrest and order the seizure of the records both as incident to his arrest and as something he is improperly withholding from the Grand Jury.

MR. DYSON: I understand. I have —

THE COURT: You'll have to prepare an order for that, you know.

MR. KLEIN: Very well, your Honor.

THE COURT: Do you have the facilities across the street, there?

MR. KLEIN: Yes, I do, your Honor.

MR. DYSON: Hopefully, we won't reach that. I have a full set of the papers, the various orders I describe, up to the Notice of Appeal, which I'm giving Mr. Klein a set and tendering a set in the opposite order, it should be, to your clerk, your Honor.

THE COURT: Well, all right. I think you'll all need a little time.

MR. DYSON: I beg your pardon?

THE COURT: I think you both need a little time.

MR. DYSON: I'd like the Court to have these orders.

THE COURT: I will take them. I'm going to read them. We'll meet again at two o'clock. You may have to have some other orders prepared, Mr. Klein, depending on what Mr. Dyson tells you.

MR. DYSON: I'm tendering three orders to your clerk, your Honor. I'm not tendering the Notice of Appeal.

THE COURT: I don't get that.

MR. KLEIN: It is my understanding, your Honor, that the order you wish the government to draft is one finding Mr. Spiegel in criminal contempt.

THE COURT: I wish — do you wish it?

MR. KLEIN: Indeed, your Honor. And that the sentence be one of incarceration.

THE COURT: Well, no. I'm going to order — I'm going to find he is in contempt, direct that he be produced before me, or, if he claims to be too ill, to be taken forthwith to a government hospital and examined — I don't know if you can use 18 U.S..C. 4244 for that. There ought to be provisions. It is equivalent to a competency to stand trial — and also directing that both as incident to his arrest, since he has the records in his possession, and also in aid of execution of the process of the Grand Jury that the Marshals shall take those records as they find them in his house, it being admitted that they are there by his counsel —

MR. DYSON: How —

THE COURT: — himself.

MR. DYSON: Now, do I understand, however, that we avoid that?

THE COURT: No problem.

MR. DYSON: Should we follow the original suggestion of the Court that the records be delivered to the Court —

THE COURT: Right. The Marshal will go down and pick them up.

MR. DYSON: — under seal?

THE COURT: Under seal. Not to be delivered to the United States Attorney —

MR. DYSON: Pending —

THE COURT: — but to be held under seal by the Clerk of the Court pending the ultimate adjudication of his Fifth Amendment claim.

MR. DYSON: Which may very well be in the Supreme Court.

THE COURT: Wherever it is, it is.

MR. DYSON: The ultimate —

THE COURT: As long as any stay is granted. I will not grant a stay.

MR. DYSON: I understand.

THE COURT: I will turn them over. I'll give you a little time to get a stay. If the Circuit doesn't stay it, they're going over. Is that fair enough?

MR. DYSON: I understand that. I would attempt to — obviously, to do this.

THE COURT: I'll give you a —

MR. DYSON: A few days?

THE COURT: — couple of days.

MR. DYSON: Sure.

THE COURT: I'll give you to the middle of next week. I'll give you to the end of next week.

MR. DYSON: The end. Have to be in New Orleans Monday and Tuesday.

THE COURT: Give you to the end of next week. You can draft a different order for this, the two of you together, if that's the way to go.

You ought to provide the Marshals will take them, hold them under seal in the Clerk's office — delivered to the Clerk of the Court to be held under seal to be released to the United States Department of Justice a week from today, unless —

MR. DYSON: A stay —

THE COURT: — a stay is granted by a Superior Court.

MR. DYSON: The Third Circuit Justice — Judge?

THE COURT: Yes. Probably, that should be sufficient to be a denial of the stay beyond a certain point.

If you want such an order, in other words, you may need a separate piece of paper.

MR. DYSON: That is why I left the blank.

THE COURT: I'll fill it in appropriately. I'll be able to do that. It all depends on you.

MR. DYSON: I understand. Two o'clock?

THE COURT: Two o'clock. All right?

MR. DYSON: Fine.

(Recess.)

THE COURT: What have you decided to do, Mr. Dyson?

MR. DYSON: I had an opportunity, your Honor, to discuss this matter with Mr. Spiegel, and we will agree, as I understand it, to follow the procedure of the Court, which would be to turn the — the documents over under seal to the Clerk.

THE COURT: I want you to use your good offices, Mr. Dyson, for I trust you and I believe you.

MR. DYSON: I appreciate that.

THE COURT: I'm not so sure I trust Mr. Spiegel.

MR. DYSON: I'm not going to comment on that.

THE COURT: No one is asking you to. But I will trust you. I want you to take the steps to be sure that we get all the documents that are appropriate.

MR. DYSON: What I was going to suggest to the Court is this: I don't believe that any inventory — I'm not talking about an elaborate inventory, but, I mean, any inventory

exists. I would like to see that done. I'm unclear on some things. What I had previously suggested to Mr. Klein while we were waiting for your Honor, what I will suggest to the Court now, I do have to be in New Orleans on Monday and Tuesday. I will be back late Tuesday night. What I would like to do is I will see — I'm telling the Court that I will personally see that the documents are delivered to the Clerk's office on Thursday morning, if that's agreeable.

Now, here is where I get confused, or I want to alleviate any confuction. We'll do that Thursday morning, deliver those documents to the Clerk's office, at which point — or now, as we stand here now, Mr. Spiegel is in contempt of Court.

Mr. Klein has prepared two orders. Has the Court had an opportunity to —

MR. KLEIN: The Court hasn't. I have them here. (Documents handed to the Court.)

THE COURT: Do we require the services of a Marshal any more?

MR. DYSON: I don't think so.

THE COURT: Do you wish him to remain?

MR. KLEIN: No, your Honor.

THE COURT: Thank you, Marshal. I'm sorry. (The Marshal leaves the courtroom.)

THE COURT: Have you read this order?

MR. DYSON: Yes, I have, your Honor.

THE COURT: As to form, it is satisfactory?

MR. DYSON: As to form, it is satisfactory.

THE COURT: All right. Let us — that will get you on your way to the Court of Appeals.

MR. DYSON: That is what I want to clarify.

THE COURT: You need a separate writing saying that I decline to stay it.

MR. DYSON: Yes. I had one — no. That was — that's right. That's the blank I left on the contempt order which are not now —

THE COURT: I can write it on here, if that would be satisfactory to you. I could simply write on here your application for a stay granted, but only until —

MR. DYSON: Friday.

THE COURT: — you know, Friday, at a certain time.

MR. DYSON: That is satisfactory to me.

What I had planned to do, when these documents are turned over on Thursday, I plan to see one of the Third Circuit Judges at that time to seek the stay.

THE COURT: The stay of this order?

MR. DYSON: The say of this order.

THE COURT: Fine. Those documents, however, will remain under seal.

MR. DYSON: I understand that. Those documents will remain under seal until all appellate —

THE COURT: Fine.

MR. DYSON: — remedies, including the Supreme Court, are exhausted.

THE COURT: Provided a stay is ordered.

MR. DYSON: Provided a stay is ordered.

THE COURT: You'll get no stay from me past Thursday or Friday.

MR. DYSON: Make it Friday, in case I fall down in the street or something.

THE COURT: Whatever day we agree on. I'm giving you that stay solely —

MR. DYSON: I understand.

THE COURT: — so that you can get before an appellate judge.

MR. DYSON: I understand.

THE COURT: I don't think you are entitled to a stay.

MR. DYSON: Of course, I think I am.

THE COURT: I'm just putting my reasons on the record. You'll be speaking long after my voice is silent. The only reason I'm giving it to you, so that I won't moot the issue. So get appellate review.

MR. DYSON: I appreciate it.

THE COURT: If the Court of Appeals doesn't grant you a stay, those boxes are going to be turned over.

MR. DYSON: I understand.

THE COURT: Now, I'm wondering, do we need a separate writing about the box?

MR. DYSON: I don't know.

THE COURT: I just want to be sure that you're in good shape.

MR. DYSON: That's a concern I'm addressing myself to now. When I arrived before, I understand, Judge Garth or Judge Gibbons, here, that I've got a complete package.

THE COURT: Sure.

MR. DYSON: I'm not going to be running around like a chicken with my head cut off.

THE COURT: If you need a few more hours to get a piece of paper to me, we'll do that.

MR. DYSON: Right.

THE COURT: The spirit of this thing is that we've got possession of the records for safekeeping in the Clerk's office.

MR. DYSON: Right.

THE COURT: He is in contempt of court for not producing them. I suppose the moment that we take possession of them he's not in contempt of court any more.

MR. DYSON: I don't know what that means.

THE COURT: Well –

MR. DYSON: He is in contempt. You have denied – as I understand it, your Honor, you have denied – well, we don't have to go back that far. You have held him in contempt for not producing the records –

THE COURT: Or –

MR. DYSON: – to the Grand Jury.

THE COURT: Yes. But I also gave him the alternative, you see. In deference to his health, I said he could either let somebody else bring them down there; he could return them to his place of business –

MR. DYSON: Right.

THE COURT: – where they could be subpoenaed anew from somebody else, or, failing that, he could simply turn them over to the United States Marshal.

In other words, I was not requiring any act of production. And the government generously agreed, by the way, to take no significance from his act of production as being an admission at any time, if I remember correctly.

MR. DYSON: And, of course, we refused that.

THE COURT: Yes. Now, however, you are opting for the alternative for me not summoning the Marshals out by giving the records to the Court –

MR. DYSON: Under seal.

THE COURT: – underseal.

MR. DYSON: And allowing us to proceed and see if we can get a Fifth Amendment claim vindicated.

THE COURT: Maybe he's not in contempt when he does that. Maybe the real issue is whether or not those records may not be turned over to the government or not.

MR. DYSON: He will, if they may be.

THE COURT: What do you think of that, Mr. Klein?

MR. KLEIN: Your Honor, I do feel, from my conversations with Mr. Dyson earlier, that there is some genuine confusion here. I don't believe that Mr. Dyson is agreeing to deposit records in the office of the Clerk with the understanding that unless he obtains a stay those records will be turned over to the government next Friday or next Thursday.

THE COURT: Yes, he understands that.

MR. DYSON: Yes, I do understand that.

MR. KLEIN: In that case, your Honor —

THE COURT: He's very smart. He knows exactly what he says.

MR. KLEIN: There are two orders before your Honor. One is the order of contempt. The other is the order for production of records under seal. If that is the thrust —

THE COURT: What I'm saying, I don't think his client is going to be in contempt any more if his client does that much. What I will — this is better for you, really, and better for your client. You don't believe me, maybe.

MR. DYSON: I'm waiting, I'm waiting.

THE COURT: The issue which you'll be litigating at that point is the issue of whether or not the records received in this way may be turned over to the Grand Jury or must be returned to your client. I will enter an order upon your assurance that these records will be here.

MR. DYSON: Thursday?

THE COURT: Thursday morning. I will enter an order on Monday morning they'll be turned over to the United States Attorney, Department of Justice, agents of the Grand Jury. It

is from that order that you can seek a stay, if you prefer, which gives your client the benefit of the fact that he has at least complied to that extent; we have the records.

MR. DYSON: What I understand —

THE COURT: If you would rather it be the other way, I'll do it.

MR. DYSON: At this point, I don't know what the other way is.

THE COURT: The other way is that I sign an order finding him in contempt. Then I'll have to discuss with you the appropriate monetary fine.

MR. DYSON: Quite honestly, the other way concerns me somewhat.

THE COURT: You don't think it is justiciable? He's got a Fifth Amendment right that you are talking about.

MR. DYSON: Yes, but he — I don't want to be in a position or in any way take some action that anybody can construe the production of those records to the Clerk's office —

THE COURT: As a waiver?

MR. DYSON: — under seal as any kind of waiver —

THE COURT: I think it is very clear that it isn't.

MR. DYSON: — of a Fifth Amendment right.

THE COURT: I think that's right. He's doing it under compulsion. I said if he doesn't do it I'll find him in criminal contempt and arrest him.

MR. DYSON: That's right. My understanding up to this point, that you were, indeed, holding him in civil contempt.

THE COURT: We were struggling together to —

MR. DYSON: Work out a resolution?

THE COURT: — work out a resolution which would both safeguard the records and give you the right to appellate review with the determination that you have to turn them over.

MR. DYSON: That's right.

THE COURT: He is in contempt today. There is no doubt about it.

MR. DYSON: If I may say this now?

THE COURT: I'm saying he may, himself, purge himself to some degree, but, under — quite clearly, not voluntarily, because he's being ordered to by the Court turn them over to the Clerk's office under seal.

MR. DYSON: I don't think it purges himself of the contempt.

THE COURT: If you will have it that way, you may. All I'm saying, will it be sufficient for you to go up on appeal from my order turning those records up to the government?

MR. DYSON: It worries me. I don't know whether that's a legitimate concern or not, to be candid about it.

THE COURT: We'll do it the other way, as you suggested. I can absolve him of criminal contempt, for I would believe that he is not being criminally contemptuous of this Court if he turns the records over to the Clerk's office on Thursday. However, until he gives authority to release those records to the Grand Jury, he will be in civil contempt. It being clear that he may release them to the Grand Jury by you, his agent, by simply turning them back to the company and let somebody else bring them down here so there is no act of production.

MR. DYSON: As we previously discussed —

THE COURT: Is that satisfactory?

MR. DYSON: I believe that covers it. But he's in civil contempt?

THE COURT: You'll have to work with me a little, Mr. Dyson, so we'll frame this thing properly. There may well be some law that in fixing the amount of penalty it has to be done with some idea of what is the minimum amount, given his financial situation, and so forth, which is necessary to coerce.

MR. DYSON: I'm not saying anything to that. I think that probably is —

THE COURT: I can't sign this order, then.

MR. DYSON: I think that's the law.

THE COURT: Yes. That's why I said it.

Oh, we can always revert back to our original plan, you know. I'm trying to work this out for your convenience, although Mr. Spiegel, I'm telling you, was standing there like the Colossus of Rhodes, telling everybody from the Senate to the Grand Jury and the Court how to do it. That is over.

MR. DYSON: I'm not trying to be difficult.

THE COURT: Who would suggest that? I'm trying to suggest a figure to put down here that you will claim later on is the wrong figure. Of course, the figure can be adjusted upwards after the appeal. But there is no necessity, because I'll have the records, you see.

I think — what do you suggest is a fair figure, Mr. United States Government?

MR. KLEIN: $1,000 a day, your Honor.

THE COURT: That's just what I had in mind, as a matter of fact. Would you say that was a wrong figure?

MR. DYSON: I would.

THE COURT: What figure would you say?

MR. DYSON: I would say — I would say that I'm not in a position to say, to be candid with the Court..

THE COURT: You know that that means that I may have to conduct an entire inquiry into his financial situation?

MR. DYSON: Yes.

THE COURT: Including looking at some of the same documents that you say I shouldn't see, because he's got them all intertwined in there?

MR. DYSON: Excuse me?

THE COURT: If you put the feed to the fire, there is no place for me to go.

MR. DYSON: How about two-fifty a day?

THE COURT: How about five hundred a day?

MR. DYSON: I haven't got my computer with me.

THE COURT: He can also comply, you know. The funny thing about it, he can always comply and move to suppress, couldn't he, Mr. Dyson?

MR. DYSON: Pardon me? He could also —

THE COURT: Comply and move to suppress.

MR. DYSON: I don't know whether he could or not. I really don't.

THE COURT: Would you advance the argument that he couldn't?

MR. KLEIN: I wouldn't be in a position of counseling defense counsel. Of course, the government believes he has no Fifth Amendment privilege in the documents.

THE COURT: He wouldn't waive it by complying with the Court order, would he? That would be peaceful submission to lawful authority, wouldn't it?

MR. DYSON: I wouldn't advise anybody to do that. Also, my point is this —

THE COURT: All right. $250 a day. You will agree that that amount is reasonable and not challengeable as the amount? I'll take your amount, but you can't turn around and attack it later.

MR. DYSON: Would you indulge me a moment, your Honor?

THE COURT: Surely.

(There is a pause in the proceedings.)

MR. DYSON: Just thinking about it more than anything else, your Honor. Two-hundred fifty is $1,000 every four days. Seventy-five hundred a month.

THE COURT: So what does that mean?

MR. DYSON: That is a substantial amount of money. I think that's a substantial amount of money. —

THE COURT: You don't think that is reasonable?

MR. DYSON: — for anyone.

THE COURT: You would say that was, even if he was in contempt unreasonable?

MR. DYSON: Maybe one hundred a day?

THE COURT: I'll tell you what I'm going to do, Mr. Dyson. I'm going to hold a hearing. They say they have the tax returns. I'll look at his tax returns. I'll look at whatever financial records they have. I will consider financial records that you wish to present to me.

MR. DYSON: That may be the best way to do it.

THE COURT: In that way, we can fix the exact amount.

MR. DYSON: I'll be more comfortable with that.

THE COURT: I shall fix it now at $100 a day running from today, stayed until Thursday.

MR. DYSON: Friday.

THE COURT: Friday. On Thursday, however, I shall hear the evidence. At that time, I may amend my order. Is that reasonable to you, Mr. Klein?

MR. KLEIN: Yes, your Honor. That would be a week from yesterday?

THE COURT: Yes.

MR. KLEIN: The 15th, I believe.

THE COURT: So you can come on down. What time could you be here?

MR. DYSON: Late morning. Eleven, eleven-thirty, as we have been doing.

THE COURT: Fine. You'll have the records with you.

MR. DYSON: Before then. I'll have them delivered.

THE COURT: To the Clerk of the Court.

MR. DYSON: Clerk of the Court.

THE COURT: Prepare an inventory, please. I think for your own sake and for ours. It will all be under seal.

Re-thinking it while you were conferring, it seems to me they are still in his constructive possession while they're here, so you have no right to turn it over to anybody. Just that we are keeping them here physically for safekeeping. That's all.

So he is still in contempt.

MR. DYSON: I think so.

THE COURT: You are right. We have no right to turn them over even though we are in possession, because they are still in his custody, still. Is that right?

MR. DYSON: I think so.

THE COURT: He is now and continues to be in contempt of court until they are released from the Grand Jury. They will be released from the Grand Jury one of three ways. Either by his consent or by order of this Court, unless a stay is given after Friday, or, if a stay is given after Friday, by order of a superior court.

MR. DYSON: Of a superior court?

THE COURT: Yes.

MR. DYSON: I think we all understand.

THE COURT: Agree with that, Mr. Klein?

MR. KLEIN: Yes, your Honor. Is the Court going to sign the orders?

THE COURT: Right now.

MR. KLEIN: I might point out in the Order of Contempt the last sentence will have to be changed by your Honor.

THE COURT: I will. I am going to physically change it.

MR. KLEIN: Very well.

THE COURT: Understand, I'm agreeing to $100 a day now.

MR. DYSON: There will be a hearing?

THE COURT: There will be a hearing. I may raise it if they have evidence which shows me that $100 a day is woefully insufficient to compel compliance.

MR. DYSON: I'm not being facetious. Or even reduce it?

THE COURT: Of course. At any time contempt orders are reviewable. Circumstances change.

I'm changing this to read, "It is further ordered that the above order imposing a fine be stayed until" — shall I say 5 p.m. —

MR. DYSON: Friday.

THE COURT: — Friday?

MR. DYSON: The 16th.

THE COURT: All right?

MR. DYSON: Yes.

THE COURT: Do I have to sign this other order, too? I believe the attorney when he tells me that he's going to produce the records. Do you want that order signed?

MR. DYSON: Yes, your Honor.

THE COURT: Okay.

MR. DYSON: We are talking about the order for production of records under seal?

THE COURT: Right. The form of this is satisfactory to both, I take it?

MR. KLEIN: Satisfactory to the government, your Honor.

MR. DYSON: Satisfactory to Mr. Spiegel.

THE COURT: Okay. Mrs. Smith, please file these. You can have conformed copies.

MR. DYSON: We'll certainly wind it up Thursday, hopefully.

THE COURT: You'll be on your way.

MR. DYSON: Thank you, your Honor.

THE COURT: Thank you, Mr. Dyson.

Thank you, Mr. Klein.

MR. KLEIN: Thank you, your Honor.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Misc. No. 80-53

IN THE MATTER OF:
THE GRAND JURY EMPANELLED March 19, 1980

Transcript of Proceedings
Newark, New Jersey
January 15, 1981

Before: The Honorable HERBERT J. STERN, U.S.D.J.

Appearances: WILLIAM W. ROBERTSON, United States Attorney,
By: JOHN KLEIN, Special Attorney,
Department of Justice (DC)
For the Government.

THOMAS R. DYSON, ESQ. (DC)
For Irving Spiegel.

THE COURT: Okay. This is the government's opportunity to present evidence, is it?

Ready?

MR. KLEIN: Ready, your Honor.

THE COURT: Let's go.

MR. KLEIN: Your Honor, the government has a number of documents which it would like to present to the Court. I don't believe there is any question as to their authenticity.

THE COURT: Have you shown them to Mr. Dyson?

MR. KLEIN: I have.

MR. DYSON: He has, your Honor.

THE COURT: Any objection?

MR. DYSON: No, your Honor.

THE COURT: All right.

MR. KLEIN: Does the Court wish them marked or does the Court wish to see them?

THE COURT: We probably have to mark them in. The Court Clerk is out of the room for a moment. Let me see them. We'll mark them in later.

MR. KLEIN: I'm handing the Court the 1040 income tax returns for Mr. Isadore Spiegel for the years 1978, 1977, 1976, 1975 and 1974.

I'm also handing to the Court the corporate income tax return for Spiegel Trucking, Incorporated for the year 1977 and I'm also handing to the Court the Annual Report submitted to the Interstate Commerce Commission by Spiegel Trucking, Incorporated, for the period ending December 31, 1979.

(Documents handed to the Court).

THE COURT: Will this comprise the sum of your evidence?

MR. KLEIN: Your Honor, I would also be able to present testimony from a Special Agent of the Internal Revenue Service as to real estate owned by Mr. Spiegel. The assessed value of that real estate and the fact it is free and clear from encumbrances.

I would, of course, like to make some comments with respect to those returns after the Court has had an opportunity to review them.

(There is a pause in the proceedings.)

THE COURT: Well, 1978 he gave no information and paid no tax. Is that it?

MR. KLEIN: That's correct, your Honor. He did not assess a tax to himself on his return.

THE COURT: He claimed that it would furnish a link in a chain, and so forth, so on. Took the Fifth Amendment, in other words, per the letter from his accountant.

MR. KLEIN: That's correct, your Honor.

THE COURT: All right. In the prior years, outside of 1978, he did file returns in which he did give information concerning his gross income and net income, taxable income, so forth, so on; tax due and owing, right?

MR. KLEIN: That's correct, your Honor.

THE COURT: What comments, if any, did you want to make about these returns?

MR. KLEIN: I would point out, your Honor, with respect to Mr. Spiegel's 1040 or his personal income tax return, that he acknowledges business income from the Spiegel Trucking sole proprietorship; in 1977 the gross receipts of the sole proprietorship were over a million dollars. The gross profit reported was —

THE COURT: When was this?

MR. KLEIN: For the year 1977, your Honor.

THE COURT: Oh.

MR. KLEIN: The profit or loss, Schedule C, the profit or loss from business or profession —

THE COURT: Right. Proceeds were $943,000.

MR. KLEIN: That's correct, your Honor.

THE COURT: Yes.

MR. KLEIN: The gross receipts were just over a million. Then he had returns and allowances of 57,000.

THE COURT: That's right.

MR. KLEIN: The balance of almost a million.

THE COURT: Right.

MR. KLEIN: He showed a gross profit of just under $400,000. This is a sole proprietorship of Isadore Spiegel.

In '76 the gross receipts were 988,000.

THE COURT: How come he pays such a little bit of income tax?

MR. KLEIN: Well, your Honor, the government is convinced that may be one of the reasons that we are here at all. That is why, your Honor, the government wished to —

THE COURT: He claims only $43,000 in taxable income or something like that.

MR. KLEIN: That's correct.

THE COURT: I don't want to wade through all of this. Even if I could, I wouldn't understand it, probably.

What has he got? Real estate he depreciates against or something?

MR. KLEIN: He does, your Honor. Obviously, the government is not in a position to explain the types of deductions and to certainly attest to their accuracy and validity.

THE COURT: Because he won't give you the information?

MR. KLEIN: That's correct, your Honor. The return has to speak for itself in that regard. But I did want to point out to the Court for the years '74 through '77 the gross receipts of the sole proprietorship which he owns and the gross profits of that sole proprietorship which, even assuming the absolute validity of all of the deductions, would give the court some ideal of the value of all of the sole proprietorship of Mr. Isadore Spiegel. The government would submit that the value of that sole proprietorship is, indeed, substantial.

THE COURT: He shows the same, about a million dollars each year?

MR. KLEIN: Well, I have summarized it, your Honor. In '76 the gross receipts were 988,000.

THE COURT: That's right.

MR. KLEIN: '75, 891,000.

THE COURT: 891,000, right?

MR. KLEIN: Yes.

THE COURT: Well, take 1977. How does he get to a taxable income of a little over 40,000? I can't follow it.

MR. KLEIN: Well, your Honor —

THE COURT: He's got total deductions from the business of about 354,000, right?

MR. KLEIN: That's correct, your Honor.

THE COURT: How does he get a net profit of 43,000?

MR. KLEIN: I hate to be put into a position, your Honor, of trying to explain Mr. Spiegel's income tax return. But I believe he just takes the total income of 398 and subtracts —

THE COURT: I see.

MR. KLEIN: — the business expenses which he has listed.

THE COURT: But he won't show anybody the records?

MR. KLEIN: That's correct, your Honor. The government is in a very difficult position of trying to explain the assets of the individual, because we don't have the books and records. It's very difficult for us to show.

I would also point out to your Honor with respect to the 1977 return of the Spiegel Trucking, Incorporated, the ICC report filed by Mr. Spiegel, himself, signed by Mr. Spiegel, verified by Mr. Spiegel, says he is a 100 percent owner of Spiegel Trucking. To give the Court an idea of what that asset is, this man has substantial assets. The 1977 return of Spiegel, Incorporated, shows assets of that corporation of $1,346,000. Mr. Spiegel is the sole stockholder of that corporation.

THE COURT: You mean the net assets?

MR. KLEIN: Your Honor, the return — I think it's on the back of the group of returns that you have. If I would direct your Honor to the last page of the corporate return, which shows — Schedule L. It's the balance sheet. It shows total assets of $1,346,000.

THE COURT: Yes.

MR. KLEIN: The liabilities and stockholder's equity, of course, equals that same amount. The retained earnings or the stockholder's equity totals $109,000, and the second largest liability are loans from stockholders. Of course, the sole stockholder being Mr. Spiegel. He's owed $527,000 from the corporation.

So I would think, your Honor, just on the basis of the sole proprietorship and the Spiegel Trucking, Incorporated, indeed, the government has some information — but we are not prepared to put it on the stand here today — that he has ownership interests in other corporations and business entities.

THE COURT: How about bank accounts? Do you have any information about liquid bank accounts?

MR. KLEIN: We do not, your Honor.

THE COURT: You say you have information about real estate?

MR. KLEIN: Yes, we do, your Honor. We have checked his home to determine its assessed value.

THE COURT: What is that?

MR. KLEIN: Your Honor, I would have to defer to Special Agent of the IRS Vince Morrison, who is here. You can swear him in, if you chose, or he can simply tell you.

THE COURT: It may be there will be no dispute about it. I don't know. Maybe.

MR. DYSON: I have no idea. I don't see the necessity to have the witness sworn. He can.

THE COURT: What did you find assessed —

MR. MORRISON: $182,500 assessed value.

THE COURT: Assessed value?

MR. MORRISON: Yes.

MR. KLEIN: As of when, Mr. Morrison?

MR. MORRISON: 1980. The Assessor of Millburn Township says the present market value is approximately $350,000, at least. There is no record of any encumbrances that we can find.

THE COURT: No mortgage? He owns it free and clear?

MR. MORRISON: So far as I can find, your Honor.

THE COURT: Any other real estate he owns?

MR. KLEIN: We were not able to find any. I can say to the Court that there isn't any.

Your Honor realizes we've had Monday, Tuesday and Wednesday only. But we would submit just from the assets that we have demonstrated to the Court today Mr. Spiegel is, as we understand it, single. He has no children. I believe he listed his mother —

THE COURT: Yes.

MR. KLEIN: — on the '77 returns as his sole dependent.

THE COURT: Right.

MR. KLEIN: He's a man of substantial assets, a wealthy man. And we would submit in view of just this — and, indeed, there may well be more than —

THE COURT: $100 —

MR. KLEIN: For the limited nature of this, I apologize.

THE COURT: $100 a day is ridiculous.

MR. KLEIN: Not reasonable.

THE COURT: It has no coercive effect on a man of his wealth.

MR. KLEIN: The government would repeat and renew the request to have the Court impose a fine of $100,000 a day.

THE COURT: Mr. Dyson, before I hear from you, have you delivered the documents today?

MR. DYSON: They should be, your Honor. The gentleman is right here. One second, please.

They are right outside the courtroom now.

THE COURT: Would you mind if we take just a quick peek to see what we are talking about?

MR. DYSON: No.

THE COURT: Not many, necessarily. Just the bulk of it.

MR. DYSON: I understand that. Would you like to have them brought into the courtroom?

THE COURT: Yes. That's fine. Unless it is so bulky, in which case I'll walk out if you want me to.

MR. DYSON: Probably about four or five Transfer files.

THE COURT: The little files or the big ones? Big ones? All right.

(There is a pause in the proceedings.)

MR. DYSON: Your Honor, if the court really wouldn't mind, it might be easier if we walked out.

THE COURT: The other thing I'm thinking of doing is having the accountant, your witness the accountant —

MR. DYSON: Mr. Rosen.

THE COURT: He's the one who usually worked on the records. Maybe I'll have him come take a look to see whether or not those are the full records for those years.

Do you have any problem with that?

MR. DYSON: I don't think so.

THE COURT: I mean, he always worked on them, anyway. I wouldn't use him later on to say what he saw in terms of —

MR. DYSON: Because they are under seal.

THE COURT: Yes.

MR. DYSON: It is my understanding that these are, indeed, all of the records.

THE COURT: Mr. Dyson, I believe you. I'm not so sure I believe your informant.

THE COURT: All right. For the record, I've examined the three or four large boxes, a couple of small boxes. They've been all sealed up. That's fine.

I think what we shall do is right after this Mrs. Smith will take charge of them. You'll have your good fellow, there, move them where she tells you to. Probably put them in a safe or wherever the Clerk thinks it is advisable.

Is that satisfactory to you?

MR. DYSON: Yes, it is, your Honor.

THE COURT: Second of all, I will want that accountant to take a look and to give me his certification that those are the records of the company for the years of which it has been represented.

MR. DYSON: In the subpoena?

THE COURT: That's right. Then they'll be resealed. He will not be questioned. The government may not question him about what he has seen this time, for he will simply be performing an accounting function for the Court and doesn't waive any of Mr. Spiegel's Fifth Amendment rights thereby.

Is that satisfactory to you?

MR. DYSON: Yes.

As a practical matter, how would you like that done?

THE COURT: Well, in the next day or two you can make the arrangements. Let him come down next week.

MR. DYSON: Next week.

THE COURT: Is that satisfactory to you?

MR. KLEIN: Satisfactory, your Honor.

THE COURT: Do you want to be heard on the issue of the fine?

MR. DYSON: Very briefly.

THE COURT: Yes?

MR. DYSON: Very briefly. On this issue it would not be my plan to come with Mr. Rosen next week when he comes. I assume he would just go to the Clerk's office, examine the records, reseal —

THE COURT: You can make the arrangements with Mr. Klein and the Clerk's office.

MR. DYSON: Right.

THE COURT: He can come alone, as long as he understands from both of you what he's looking for in terms of, you know, the appropriateness of documents given what has been subpoenaed for the years involved.

MR. DYSON: Then the Court would then like a letter from him?

THE COURT: Under oath.

MR. DYSON: An affidavit stating these are —

THE COURT: To the best of his knowledge and belief, these are the records for those years entirely or to the best of his knowledge and belief, certain records are missing, such as, whatever it is.

MR. DYSON: I — okay.

As to the fine, your Honor, I think it's all well and good to discuss the matter of the gross income of the proprietorship, gross income, so on and so forth, but the telling figure is the figure that now is before you on his tax return. As to the house, while I am not sworn, obviously, I have been told that the land was purchased some time ago. The house had burned down on the land ten or eleven or twelve years ago. The land was purchased. And most — some 80, 85 percent of the work was really done by Mr. Spiegel.

THE COURT: You mean he built it with his own hands?

MR. DYSON: Not single-handedly, but in effect, it can be said that is a house that he built.

THE COURT: What is the difference?

MR. DYSON: It's not like I might go out and buy myself a $350,000 house, which I can't.

THE COURT: Whether he put the greenbacks into it or he put his labor into it.

MR. DYSON: I understand it, the value.

THE COURT: It is an asset which has a certain value.

MR. DYSON: Today, I understand that.

THE COURT: Yes.

MR. DYSON: The only real argument that I would make to you is under the circumstances that we find ourselves in now, I don't see the fundamental fairness of penalizing a man who is asserting or attempting to assert what he believes honestly and sincerely is a constitutional right, a Fifth Amendment right.

He has agreed to bring the records down under some persuasion by the Court.

THE COURT: You mean it was a voluntary agreement?

MR. DYSON: No. I don't mean that.

THE COURT: No.

MR. DYSON: But he did not continue to stand, if you will, as this Court put it, as the Colossus of Rhodes.

THE COURT: Because the Colossus was about to be moved.

MR. DYSON: Well, you wouldn't do that today.

THE COURT: No. That is why he decided not to be a Colossus.

MR. DYSON: So the records are here —

THE COURT: Yes.

MR. Dyson: — pursuant to the agreement.

I don't believe — it strikes me as repugnant to fine a man for, as I say, asserting his constitutional right.

If he wins in the Third Circuit, he wins. If he loses, you have the records.

Now, if Spiegel or anyone else in this circumstance were to lose in the Court of Appeals, but still retain possession of the records and then refused, certainly —

THE COURT: Why couldn't you make the same argument in terms of his right for certiorari?

MR. DYSON: I would.

THE COURT: Sure.

MR. DYSON: I don't mean to say that I wouldn't at all.

THE COURT: So?

MR. DYSON: I would.

THE COURT: You don't mean to imply merely because he loses there he will turn them over.

MR. DYSON: No.

THE COURT: I wouldn't turn it over then because you would say he has the right to argue in the Supreme Court of the United States.

MR. DYSON: Yes.

THE COURT: If you figured a way to get there, you would go to the World Court, too.

MR. DYSON: I don't think I could get in there.

THE COURT: I don't think so, too. They take even fewer cases.

MR. DYSON: But let's take it out, utlimately when — if he loses.

THE COURT: He's had a judicial determination right now.

MR. DYSON: You have found him in contempt. Right.

THE COURT: Before I found him in contempt, I had extensive hearings.

MR. DYSON: True.

THE COURT: I granted him every courtesy that he asked for. Counsel came. I heard counsel. I looked at documents submitted to me in camera by counsel. I issued an order. New counsel came, needed certain adjustments for scheduling. There was no difficulty in getting them from the Court. We gave whatever was asked for.

MR. DYSON: Yes.

THE COURT: Counsel came. I heard argument. I made a ruling. Again we stayed our hand. Efforts were made now that there had been again another presentation, again consideration and again a ruling, this time after hearing factual presentation, I think.

This might have been — there might even have been a time before that with new counsel. But there even came a time when I listened to evidence presented by him, which in my judgment, even — if there had been doubt about the legal ruling before, the evidence which he supplied was so clear and convincing that, you know, no novel approach need by taken.

Again, no hammer came down on him, no muzzle. Efforts were made to sensibly adjust the situation.

For every effort, you know, at compromise he's put aside, really.

I don't know — I suppose it's possible that he's fighting a battle of principle. Not likely. Not given his tax return where he took the Fifth Amendment, even just in terms of telling the United States government what his income is. It may be he has something to hide. I don't know.

This I do know: The right to be heard and the right to litigate are not to be confused, it seems to me, with the obligation that he has to obey the lawful orders of the Court. While I really don't try to cloak myself with infallibility, Lord knows, I'm far from that and get reversed and expect to get reversed lots more before my time is over on this bench. Nonetheless, when I see the issue as clear; really clear, then merely on some speculative possibility of reversal, he simply can't thwart a Grand Jury investigation. Moreover, I say this without prejudice to the position that I'm espousing here because I don't think it matters.

But under the circumstances, even if he gave them over, you see, and it was determined later that he didn't need to, I think he can still move to suppress it. Obviously he's bowing to pressure from the Court. Isn't that right?

MR. DYSON: I'd have a lot of trouble with that. You may be correct.

THE COURT: Well —

MR. DYSON: It would be a big waiver problem. I can hear Mr. Klein arguing the waiver. I don't know. It's a step —

THE COURT: Would you say he waived his rights there?

MR. DYSON: Pardon me?

THE COURT: Mr. Klein.

MR. KLEIN: Pardon me, your Honor?

THE COURT: Would you say if he turned them over right now and later on argued that any fruits gained therefrom were violative of his Constitutional rights because I had no power to do it, do you think he would have waived his Constitutional rights by turning it over under the circumstances of this case?

MR. KLEIN: If he turned it over and then appealed at the same time?

THE COURT: He might not have the power of appeal then. But appeal any conviction that might entertain on that ground?

You see, I don't see why there is such a problem. If I were a policeman standing in the door and I said, you know, "Let me in or I'll break the door down," you don't waive anything.

MR. DYSON: I think it is an entirely different situation. I'd be afraid of that.

May I say something as this point, your Honor?

THE COURT: Sure.

MR. DYSON: I appreciate what you have said. I'd like to say this on the record. I think the Court has been very courteous to me and has extended itself in giving me time to accomplish this, that and the other thing. Personally, in travel and so forth. I thank the Court for that.

You and I, of course, your Honor, just simply part company on the law in this case. I, of course, believe — I'm not going to belabor the point — that Mr. Spiegel's assertion of his Fifth Amendment right is correct under the facts and circumstances of this case, particularly in light of the Third Circuit decisions in Gould and Johannsen.

Again, we have been through that, and you and I simply part company. I don't think that his appeal or forthcoming appeal from this Court's contempt order is frivolous for the purpose of delay — it's — he's got an arguable basis.

THE COURT: We part company —

MR. DYSON: A reasonable position.

THE COURT: We part company on that, too. But in the end he will not be prejudiced, for I shall fix an amount which I think is fair to coerce him into compliance.

If the United States Court of Appeals for the Third Circuit disagrees with my analysis, legal or factual, I'll be reversed. He won't have to pay anything. If they disagree, as I suppose they are likely to, as to the frivolity of it and grant you a stay, you won't have to pay anything there, either.

So I sail in calm waters, free to follow my conscience, secure in the knowledge that if wrong I'll be corrected without any attendant harm to your client, for I believe he can't continuously just file tax returns in which he refuses to disclose what his taxable income is or pay a dime of taxes to the United States Government. I believe that he cannot simply refuse to turn over any books or records of the company as large, as vast, as grand as his to a Grand Jury under the circumstances, for I also believe that he simply cannot gather the records to his bosom and retire literally to his bedroom, drawing, as I have put before, a congruous circle, which was words not created by me, but come directly from United States versus Sullivan written by Mr. Justice Holmes in just such a case, involving the refusal to account on income tax returns any such information. Those are exactly the words of Mr. Justice Holmes.

I don't think it is arguable. But, you know, I may be wrong and you are on your way to correcting that error if I'm wrong.

Now, let's talk about money. Do you have any evidence you want to offer?

MR. DYSON: No, I don't.

THE COURT: All right. Then I'm in this difficulty: I am anxious not to just sweep everything that he has into the fire. I'm not here —

MR. DYSON: I beg your pardon? I didn't hear your Honor.

THE COURT: I'm anxious not to just sweep everything he has into the fire. I'm not here to impose Draconian penalties on him over and above what is necessary to secure compliance with the orders of the Court. I think our moderation in that regard may be shown in the fact, you know, we impose a $100 a day fine when we were up in the air about it.

By the same token, fairness, even kindness, is no license to thumb one's nose at the Court. I cannot with certitude fix the amount of money because I'm being deprived of the information that I need by the contemptor, himself. Those records which are under seal, other records which are available to him would provide me additional information.

Thus, it is true that the sum I fixed may not be the one which I would fix with clearer and more complete knowledge. But to the extent that I do not have that knowledge, it is not because the United States is not anxious to bring it before me. It is because as a part of the contemptuous conduct of Mr. Klein — Mr. Spiegel, rather — that I cannot. $1,000 a day is too much. That would amount to $365,000 a year. I think that is — that would not be deductible, I don't think, under anybody's calculations.

MR. DYSON: I don't know. I doubt it.

THE COURT: That is, based on what I've heard here, ruinous.

But I think $600 a day is where I will start. If the United States is able to find more information, I may well revise that figure. That is roughly two hundred — that is roughly at the rate of about $200,000 a year.

MR. DYSON: That is ruinous.

THE COURT: It's a terribly difficult penalty, but I cannot punish him and hold his hand at the same time. I cannot punish him so that he will obey the lawful orders of the Courts of this nation, and, at the same time, knowing that if it is too much he has deprived me of the ability to know it is too much.

I'm just doing the best I can. I think it is moderate, under the circumstances.

MR. DYSON: May I say something, your Honor?

THE COURT: Yes.

MR. DYSON: Have you concluded:

THE COURT: Sure.

MR. DYSON: I would like to say to your Honor that he's — recognizing that he's in contempt, he's not thumbing his nose at this Court or any other Court, but he's trying to assert a legal right, a constitutional right that he believes he has.

He has turned the records over. If he loses, the government has the record.

So, I don't think that he should be categorized as thumbing his nose.

THE COURT: There may be a statute of limitations problem.

MR. DYSON: We discussed that. Mr. Klein, I think, conceded to you that that is not a problem.

THE COURT: Not at this moment, maybe. But once you finish in the Circuit and finish in the Supreme Court of the United States, if you had your way, it could well be, you know, a year or a year and a half from now before the Grand Jury would be able to see the records. The fact that we have the records now, as you have pointed out yourself, is hardly as a result of a gratuitous act of your client or one which evinces a kindliness towards either the Court, the Grand Jury or those who seek to see them.

He did it solely because he was told they would be taken from him otherwise. The fact that we are here and not there does not advance the cause of the Grand Jury one whit. It merely allows for the destruction or alteration of documents. That is the reason they were taken. Because in my judgment, given his position, it was unsafe to leave them there. Well —

MR. DYSON: One last thing. I object to the $600 as being —

THE COURT: Show me evidence.

MR. DYSON: — as being ruinous.

THE COURT: Show me evidence.

MR. DYSON: I'm not prepared to at this time.

THE COURT: Any time you are, I'll listen to you. Come back to me if you can show it to me and I'll hear you. Show me that it is ruinous and I'll take action.

But until then, it's the best I can do. By the same token, the door is open to the United States. You'll need to prepare an order right away.

Do you have an order denying a stay?

MR. DYSON: Let's see now, your Honor.

The previous order that was submitted to you, the contempt order, it was my understanding that you were going to write on the bottom of that "application for a stay denied."

THE COURT: Didn't I do that?

MR. DYSON: You haven't seen it yet.

THE COURT: Mrs. Smith, do you have the order here?

THE CLERK: No. I thought the file was upstairs.

(The Clerk and the Court confer.)

THE COURT: Draft an order allowing Mr. Rosen to see the records, too. We need a separate order for that. I'll take a look at that because you'll need something. If you go to the Circuit Judge, they'll want to see the order.

MR. DYSON: I need to get certified copies, it was my understanding.

THE COURT: You'll need a notice of appeal.

MR. DYSON: I have that. I have that, and an application for stay, so on and so forth.

THE COURT: I'll sign whatever is necessary to get it together for you.

MR. DYSON: All right. You will be here this afternoon in the event —

THE COURT: Yes.

MR. DYSON: Okay.

I, of course, have told Mr. Klein that I'm going as soon as possible to a Circuit Court Judge here in the building. I think he wants to come with me. Is that true?

MR. KLEIN: I might accompany you in case the Court of Appeals has any questions with respect to the government's position.

THE COURT: You might?

MR. KLEIN: As yet, I don't believe you filed the notices of appeal.

THE COURT: What did you say? You might?

MR. KLEIN: Pardon me, your Honor?

THE COURT: You said you might.

MR. KLEIN: I will be with him, your Honor.

MR. DYSON: As soon as we conclude here, it is my plan to go immediately to the Clerk's office, file the notices of appeal and see what I have.

THE COURT: Fine.

(Recess.)

THE COURT: Why don't you come up here and we'll thrash this out. I understand Judge Garth denied a stay. Is that it?

MR. DYSON: He denied a stay, your Honor, of the fine.

My understanding was — I need some clarification from the Court. My understanding was that after five o'clock tomorrow afternoon — you stayed the fine until five o'clock tomorrow afternoon.

THE COURT: It was my intention to so that you would get review.

MR. DYSON: Right. Running at $100, now $600.

THE COURT: As of today it will run at $600 a day. I can't do it retroactive to now. That wouldn't be appropriate. That is seven days a week.

MR. DYSON: I know that.

My understanding was that you also were going to turn the records over to the government at five o'clock tomorrow unless I got a stay.

THE COURT: Would you like it that way?

MR. DYSON: No, no.

THE COURT: You'd like me to maintain them?

MR. DYSON: I'd like you to maintain them.

THE COURT: You would agree to that?

MR. KLEIN: That that is the order of the Court, that they be maintained?

THE COURT: Yes.

MR. KLEIN: Yes. That is what the Court's order reads.

THE COURT: So there is no dispute between you?

MR. DYSON: My concern is over. The records will remain under seal in the Clerk's office.

THE COURT: You understand that I'm not likely to pay any of that money back?

MR. DYSON: I understand that.

THE COURT: Now, we ought to make provision for how you will be paying it.

MR. DYSON: That is what I want to ask you next.

THE COURT: What is satisfactory to the United States?

MR. KLEIN: Imposed on a daily basis, your Honor. We feel it should be paid on a daily basis.

THE COURT: What do you suggest?

MR. DYSON: It seems to me, your Honor, that that — let's see. As of tomorrow we'll owe a fine for X days. I don't know what the days —

THE COURT: I haven't, you know — as they say, who is counting? You are.

MR. DYSON: Yes.

THE COURT: Right.

MR. DYSON: It could be paid by —

THE COURT: You have no intention of complying, I gather.

MR. DYSON: Of complying? That is, in turning over the records?

THE COURT: Yes.

MR. DYSON: No.

THE COURT: They are still in your constructive possession. They are not in anybody's possession but yours. No one may look at them without your permission. I will give no one permission to look at them. They are merely here rather than in your client's bedroom or wherever he keeps them because I didn't want them to be missing.

How do you want to do it? Daily? It gets cumbersome, doesn't it?

MR. KLEIN: It may, indeed, your Honor. But, nevertheless —

THE COURT: Who is going to sign the check?

MR. DYSON: I haven't considered that. I guess Mr. Spiegel is going to sign. He's ill.

THE COURT: Do you want a Marshal to go up there every day? How do you want to do it?

MR. KLEIN: I think he can mail the check to the Clerk's office each day, your Honor.

MR. DYSON: Could we do it on a weekly basis, your Honor?

THE COURT: Daily. He owes it every day. He'll pay it every day.

MR. DYSON: Suppose he delivers —

THE COURT: He can pay in advance if he likes.

MR. DYSON: That is what I'm saying.

THE COURT: That's up to him. It's up to him. Pay it daily or in advance. If he's in arrears —

MR. DYSON: I understand, your Honor. I'm clarified.

THE COURT: Okay. All right. Work it out together.

MR. KLEIN: Fine, your Honor.

MR. DYSON: Thank you.

THE COURT: He owes some money right now — no. Five o'clock tomorrow.

MR. DYSON: Tomorrow.

THE COURT: Are you going to pay?

MR. DYSON: Yes.

THE COURT: Five o'clock tomorrow he starts paying. Have a nice day.

MR. DYSON: When is that due? The Clerk's office is closed five o'clock.

THE COURT: Monday morning.

MR. DYSON: Monday morning.

THE COURT: Thank you.

MR. KLEIN: Thank you, your Honor.

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No. 80-2158

In the Supreme Court of the United States

OCTOBER TERM, 1980

ISADORE SPIEGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

WILLIAM G. OTIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a person doing business as a sole proprietor may refuse on Fifth Amendment grounds to comply with a grand jury subpoena for business records on the ground that the contents of the records are potentially incriminating.

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OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. 1a). The contempt orders of the district court (*id.* at 8a-9a, 11a-12a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1981. A petition for rehearing was denied on April 21, 1981. The petition for a writ of certiorari was filed on June 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 7, 1980, a federal grand jury sitting in the District of New Jersey caused a subpoena duces tecum to be issued to the custodian of records of "I. Spiegel and any related entity doing business as 'Spiegel Trucking.' " This subpoena, which was served on petitioner, called for the

production of all of the business records of "I. Spiegel" for a five-year period. Petitioner moved to quash the subpoena, and several hearings were held, which established that "I. Spiegel" was a sole proprietorship (Pet. App. 73a), that petitioner had used a single checking account (held in the name of the business) to pay his personal and business expenses (*id.* at 73a-74a), that petitioner had prepared or directed others to prepare the business's records, and that petitioner was the sole custodian of the records (*id.* at 34a).[1]

At the second and third hearings, on November 17 and December 23, 1980, the district court ruled that the subpoenaed documents were business records and that petitioner had no Fifth Amendment right to refuse to permit the records to be produced (Pet. App. 36a-37a, 81a-83a, 86a, 88a). The court suggested that there were numerous ways in which the records could be produced to avoid any possibility of incrimination based on the "act of production," and the court offered to make appropriate arrangements to that end (*id.* at 66a-67a, 86a). Petitioner nonetheless persisted in his refusal to allow the records to be produced, and on January 9, 1981, the district court held petitioner in contempt, pursuant to 28 U.S.C. 1826 (Pet. App. 8a-9a).[2] The district court imposed a fine of $100, which was later

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[1]The court also found that, "It may well be that Mr. Spiegel chooses from time to time to do some of his business in a corporate name and some of his business as a sole proprietorship. It is perfectly evident from the testimony of [Mr. Spiegel's accountant], who I believe, he commingles the records, commingles the employees, and, at least for purposes of this hearing, the most critical of employees, the four bookkeepers were required to keep track of all these records" (Pet. App. 82a).

[2]The district court also ordered the subpoenaed records to be deposited with the clerk of the court under seal pending final review of the court's contempt order. On January 15, 1981, one of petitioner's employees delivered several sealed cartons of documents to the clerk.

increased to $600 (*id.* at 11a-12a), for each day that petitioner remained in contempt by refusing to produce the records. On March 16, 1981, the court of appeals affirmed without opinion (*id.* at 1a).[3]

ARGUMENT

Petitioner contends that his failure to comply with the subpoena is justified under the Fifth Amendment because he transacts business as a sole proprietor, and the records under subpoena are an amalgam of "personal and business document[s]" (Pet. 10). Petitioner's argument lacks merit.

1.a. The purpose of the Fifth Amendment privilege "is to prevent compelled self-incrimination, not to protect private information." *Maness* v. *Meyers*, 419 U.S. 449, 473 (1975) (White, J., concurring). This Court "has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort." *Fisher* v. *United States*, 425 U.S. 391, 399 (1976); see *Andresen* v. *Maryland*, 427 U.S. 463, 477 (1976).

Petitioner's argument to the contrary—that he cannot be required, consistent with the Fifth Amendment privilege against self-incrimination, to allow the production of his business records—rests on the proposition stated in *Boyd* v. *United States*, 116 U.S. 616 (1886), and repeated in the cases on which petitioner relies (see Pet. 7-8), that the government cannot compel an individual to produce his own papers.[4] However, at least this aspect of *Boyd* was

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[3]On May 26, 1981, the court of appeals stayed its mandate pending disposition by this Court of the petition for a writ of certiorari.

[4]In *Fisher* v. *United States, supra*, 425 U.S. at 409, the Court noted: "To the extent * * * that the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for 'mere evidence,' including documents, violated the Fourth Amendment and therefore also transgressed the Fifth * * *, the foundations

rejected in *Fisher* v. *United States, supra*, in which the Court held that the Fifth Amendment "applies only when the accused is compelled to make a *testimonial* communication that is incriminating" (425 U.S. at 408; emphasis in original). In *Fisher* the Court further stated (*id.* at 409-410; emphasis added):

> [T]he preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence either of the taxpayers or of anyone else.[11] The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, *whether his own* or that of someone else.

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[11]The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege. * * *. And, unless the Government has compelled the subpoenaed person to write the document, * * * the fact that it was written by him is not controlling with respect to the Fifth Amendment issue. Conversations may be seized and introduced in evidence under proper safeguards, * * * if not compelled. In the case of a documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel or document not authored by the producer is demanded. * * *.

Based on the Court's analysis in *Fisher*, therefore, the district court's order requiring petitioner to produce his business records did not violate the Fifth Amendment, and

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for the rule have been washed away. In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him."

petitioner's contempt cannot be justified on Fifth Amendment grounds. The contents of the subpoenaed records are not "testimonial," and a documentary subpoena does not compel a person to be a "witness" or to testify. Moreover, the records at issue were not prepared because of government compulsion. That petitioner prepared or directed the preparation of the records cannot by itself shield them from subpoena, because "the sole compulsion was to furnish the document to the government." *Matter of Grand Jury Empanelled February 14, 1978 (Colucci)*, 597 F. 2d 851, 861 n.24 (3d Cir. 1979). Compare *Garner* v. *United States*, 424 U.S. 648 (1976). See *Matter of Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F. 2d 469, 476-477 (3d Cir. 1979); *United States* v. *Hankins*, 565 F. 2d 1344, 1348 (5th Cir. 1978), clarified, 581 F. 2d 431, cert. denied, 440 U.S. 909 (1979) ("compulsion must result in [the person claiming the privilege] being made a *witness* against himself" (emphasis in original)); cf. *Hollis* v. *Smith*, 571 F. 2d 685, 690 (2d Cir. 1978) (Friendly, J.) ("the compulsion must be of testimony"). In sum, as the First Circuit has stated, "The line of cases culminating in *Fisher* have stripped the content of business records of any Fifth Amendment protection." *In re Grand Jury Proceedings (Martinez)*, 626 F. 2d 1051, 1055 (1980).

b. The Court in *Fisher*, having concluded that the Fifth Amendment privilege protects from disclosure only those communications that are compelled, testimonial, and incriminating, considered the implicit testimonial component of *producing* subpoenaed documents to be the only act that is compelled by a documentary subpoena. The Court thus considered whether compliance would constitute evidence admitting the existence of the documents, the identity of the documents sought and produced, or their authenticity (425 U.S. at 409-413). In light of the particular facts in *Fisher*, the Court found that compliance in that case would not raise these issues (*id.* at 412-413).

Here, petitioner contends (Pet. 9) that the subpoena cannot constitutionally be enforced because compliance "would constitute implicit authentication." This contention lacks force, however, because petitioner rebuffed the district court's efforts to assure that the act of production would carry no such implication (see, *e.g.*, Pet. App. 86a-87a),[5] and the government has "agreed on the record not to use the

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[5]Counsel for petitioner and the district court had the following colloquy at the hearing of December 23, 1980 (Pet. App. 86a-87a):

THE COURT: So we stand by where we are. We could do it under Bellis. We could do it under Fisher. We could do it under Andresen. We can even avoid the problem of the act of production. I will work out any way of producing them that you wish. But you are going to take the position that we may not have them at all; isn't that true?

MR. DYSON: That's true. And, further, because of the Fifth Amendment, and, further, that any method of working it out to avoid the act of production, I take the position that you don't avoid the act of production.

THE COURT: We could avoid it very simply. Tell him to put it back where he took them away. The government will not watch him. The government will give a subpoena to the bookkeeper, which they are perfectly prepared to do.

That would avoid the act of production, wouldn't it?

MR. DYSON: I understand what you are saying, Judge.

THE COURT: You're not saying it wouldn't—

MR. DYSON: I'm not saying it wouldn't—

* * * * *

THE COURT: Am I correct that will avoid the act of production on him?

MR. DYSON: No.

THE COURT: I'm wrong?

MR. DYSON: If I understand what you are saying—

THE COURT: Tell him to put it back in the company.

[footnote continued]

act of production against [petitioner] *in any manner*" (C.A. Br. 16; emphasis added). Thus, the act of production here would give rise to no danger of self-incrimination. See *United States* v. *Davis*, 636 F. 2d 1028, 1041 (5th Cir. 1981) (the testimonial aspect implicit in compliance "should not be a ground for refusing to produce the documents as long as the fact of compliance with the summons is not introduced into evidence at the incriminated party's trial"). Compare *In re Grand Jury Proceedings (Martinez), supra*, 626 F. 2d at 1055-1058; *United States* v. *Authement*, 607 F. 2d 1129, 1131-1132 (5th Cir. 1979).

2. The cases upon which petitioner relies do not lend substantial support to his argument that he has a Fifth Amendment privilege as to the contents of the records of his business. In *United States* v. *Beattie*, 541 F. 2d 329 (2d Cir. 1976), for instance, the court held that a taxpayer could not be required to produce letters that he had written to his accountant, but which were in the taxpayer's possession. It is not clear, however, that the court based its holding on any belief that the Fifth Amendment protected the contents of the letters. Indeed, the court's discussion of the issue, while brief, suggests that the holding was based on the need to protect the particular testimonial aspects of the act of production that it perceived there (541 F. 2d at 331). See *In re*

MR. DYSON: That is not where he keeps the records in the normal course of his business.

THE COURT: Not the testimony of the accountant.

* * * * *

THE COURT: All right, Mr. Dyson. I'm persuaded that there is nothing I can do to avoid the problem, largely because Mr. Spiegel does not wish to avoid the problem. I have found and you have even agreed with me that the fact that he took them away one day did not make them into personal records if they weren't before he took them.

Grand Jury Proceedings (Martinez), supra, 626 F. 2d at 1056. Moreover, the Second Circuit has more recently emphasized that to trigger Fifth Amendment protection the thing compelled must be testimony (see *Hollis* v. *Smith, supra*), thus undermining petitioner's contention that the holding in *Beattie* was based on the view that the Fifth Amendment privilege attaches to the content of business records. But cf. *In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*, No. 81-6086 (2d Cir. Aug. 7, 1981), slip op. 4529 n.1.

The Ninth Circuit's decision in *United States* v. *Helina*, 549 F. 2d 713, 716 (1977), provides even less support for petitioner's view because the question whether the contents of business records are privileged under the Fifth Amendment was not at issue in that case, the government not having challenged the defendant's invocation of the Fifth Amendment. The court's treatment of the Fifth Amendment issue in *Helina* was not only dictum, but it was also expressly qualified (*id.* at 716) by the statement that this Court's then-recent decisions in *Fisher* and *Andresen* "perhaps intimate a different result." Also dictum is the Eighth Circuit's discussion of the issue in *United States* v. *Plesons*, 560 F. 2d 890, cert. denied, 434 U.S. 966 (1977), in which the issue was whether medical records that the defendant had turned over to the grand jury should have been suppressed on the ground that the defendant had not been advised of his Fifth Amendment privilege to withhold the records. The Eighth Circuit concluded that suppression was not required because a grand jury witness need not always be advised of his constitutional rights (560 F. 2d at 894-895). Whether the defendant had any Fifth Amendment rights to withhold the records was therefore unnecessary to the decision.[6]

---

[6]Moreover, the court's conclusion that the defendant had such a right was based entirely on cases that were decided prior to *Fisher* (see 560 F. 2d at 892-893). To the extent that the court sought to distinguish *Fisher*,

Only the Fifth Circuit's decision in *United States* v. *Davis, supra*, 636 F. 2d at 1042-1044, squarely holds that the Fifth Amendment privilege protects the contents of business records that have not been created under government compulsion. There, the court stated (*id.* at 1042): "[T]he fifth amendment creates a zone of privacy which absolutely protects documents from production by summons or subpoena as long as they are in the hands of the owner." Compare *Maness* v. *Meyers*, 419 U.S. 449, 473 (1975) (White, J., concurring) (purpose of the Fifth Amendment privilege "is to prevent compelled self-incrimination, not to protect private information").[7] Despite the Fifth Circuit's unequivocal statement of the law in *Davis*, it must be emphasized that the court candidly questioned the logic of its own analysis (636 F. 2d at 1042-1043; emphasis added; footnote omitted):

> Support for this distinction [between "personal" and "business" records] might be found in *Andresen* v. *Maryland*, 1976, 427 U.S. 463, 96 S. Ct. 2737, 49 L.Ed.2d 627, which, in upholding a seizure of documents under a warrant, repeatedly stressed that the documents seized were business documents. 427 U.S. at 471, 474, 475, 477, 96 S. Ct. at 2743, 2745, 2746.

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it did so on the ground that the defendant's compliance with the subpoena would operate "as an assurance that the patient records produced were the ones demanded" (560 F. 2d at 893). Thus, the Eighth Circuit here, like the Second Circuit in *United States* v. *Beattie, supra*, appears to have taken a position that is equivocal at best on the question whether the contents of business records are protected under the Fifth Amendment, emphasizing instead the testimonial aspects of the act of production. See *In re Grand Jury Proceedings (Martinez), supra*, 626 F. 2d at 1055-1058.

[7]The Third Circuit has also held that the Fifth Amendment creates a "zone of privacy," but it has emphasized the "non-business" character of the documents protected within this zone. See *In re Grand Jury Proceedings (Johanson)*, 632 F. 2d 1033, 1042-1044 (1980).

> Indeed, if *Andresen* did not draw such a distinction, arguably it altogether abolished the *Boyd* principle sub silentio, for its fifth amendment analysis looked solely to the existence of compelled testimonial communication. *It is difficult to find a logical reason for applying the Boyd principle to subpoenaed documents and not documents taken in a search, as in Andresen.* See *Andresen* v. *Maryland*, 1976, 427 U.S. 463, 484-492, 96 S. Ct. 2737, 2750, 49 L.Ed2d 627 (Brennan, J., dissenting). * * *
>
> This Court, however, has already rejected interpretations of *Fisher* and *Andresen* that would either limit the *Boyd* principle to non-business records or abolish it altogether. [citations omitted] * * * We are bound by these cases. Their cumulative teaching is that any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in content.

In *Davis*, the Fifth Circuit embraced a result that it found illogical because it believed that that result was required by the law of the circuit. Nonetheless, at least some previous Fifth Circuit decisions support the government's position here—that an individual may not, so long as he is protected from incrimination by the act of production itself, invoke the privilege to defeat a documentary subpoena because the demand that he produce papers is not a demand that he become "a *witness* against himself." *United States* v. *Hankins, supra*, 565 F. 2d at 1348 (emphasis in original). See *United States* v. *Authement, supra*, 607 F. 2d at 1131-1132;

United States v. *Greenleaf*, 546 F. 2d 123, 126 & n.7 (5th Cir. 1977). But see *In re Grand Jury Subpoena (Kent)*, 646 F. 2d 963 (5th Cir. 1981).[8] Because the court in *Davis* openly questioned its own analysis, and because it failed to consider at least apparently inconsistent Fifth Circuit case law, we believe that it would be premature for this Court to grant certiorari at this time to resolve a conflict based on *Davis*. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

We note in closing that this case does involve an issue of considerable importance. Moreover, while we believe that the result reached here represents a proper application of the principles delineated by the Court in *Fisher*, we acknowledge the incipient emergence of a conflict among the circuits predicated on an apparent rejection by some circuits of the reasoning of *Fisher* that the incriminating nature of the contents of documents does not itself afford a basis for invocation of the Fifth Amendment privilege. Nevertheless, because it is not yet clear that the circuits will, upon further consideration of the somewhat complex issue involved, settle into a clear pattern of conflict, and because the decision below is fully consistent with *Fisher*, we believe that review of the issue by the Court is not necessary at the present time.

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[8]The *Kent* court noted (646 F. 2d at 968) that "[t]he prevailing justification for the fifth amendment's application to documentary subpoenas is the 'implicit authentication' rationale." The question whether production could be required if the government were formally to grant immunity commensurate with the act of production (see *In re Grand Jury Proceedings (Martinez)*, *supra*, 626 F. 2d at 1055-1058) was apparently viewed as not presented in *Kent*. See 646 F. 2d at 969 n.5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

WILLIAM G. OTIS
Attorney

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PETITIONER'S REPLY MEMORANDUM

NATHAN LEWIN
(Counsel of Record)
MARTIN D. MINSKER
SUZANNA SHERRY
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITIONER'S REPLY MEMORANDUM

I

THE SOLICITOR GENERAL CONCEDES THAT (1) THE ISSUE IS IMPORTANT AND (2) THERE IS A CONFLICT IN THE CIRCUITS

The concluding paragraph of the Solicitor General's Brief in Opposition concedes (p. 11)

> that this case does involve an issue of considerable importance.

The same paragraph also acknowledges (p. 11)

> the incipient emergence of a conflict among the circuits . . . .

Specifically, the Solicitor General agrees (pp. 9-10) that the decision below conflicts with the "unequivocal statement of the law" expressed by the Fifth Circuit in *United States* v. *Davis*, 636 F.2d 1028, 1042-44 (5th Cir. 1981). The Solicitor General asserts (p. 11), however, that the Fifth Circuit "openly questioned" in its *Davis* opinion the logic of its own holding in *Davis*, and that this makes it "premature" for this Court to consider the issue in the present case. The Solicitor General's assertion is, however, erroneous in light of more recent Fifth Circuit law.

II

THE FIFTH CIRCUIT HAS REAFFIRMED ITS "UNEQUIVOCAL STATEMENT" IN A MORE RECENT DECISION

In re Grand Jury Subpoena (Kent), 646 F.2d 963 (5th Cir. 1981),[1] involved grand jury subpoenas for the business records of a sole proprietorship having offices in Texas and California. Citing earlier Fifth Circuit rulings, the court of appeals held in *Kent* (646 F.2d at 968):

> that a sole proprietor's fifth amendment privilege against self-incrimination protects the "non-required" records of the proprietorship from com-

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[1] *Kent* was decided by a panel of Administrative Unit B of the Fifth Circuit, and *Davis* by a panel of Administrative Unit A. On October 1, 1981, Administrative Unit B will officially become the new Court of Appeals for the Eleventh Circuit, while Unit A will remain as the Fifth Circuit. Thus, when the new circuit is formed, both the Fifth and Eleventh Circuits will presumably follow their respective precedent and continue to hold a sole proprietor's business records protected by the Fifth Amendment.

pelled production in response to a grand jury subpoena directed to the sole proprietor.

Kent was a significantly weaker case for assertion of the Fifth Amendment privilege than is this case for at least two reasons:

First, Kent involved solely business records of an active ongoing commercial enterprise. In the present case, the evidence is undisputed (and the Solicitor General concedes) that the subpoenaed records include the petitioner's personal financial documents as well as those of his sole proprietorship (Br. in Opp., p. 2).

Second, in the *Kent* case a subpoena was also served upon the comptroller of the sole proprietorship, who had access to the subpoenaed records. The government argued in *Kent,* as it has done here, that the proprietor of a business is not compelled to authenticate his records and thereby engage in testimonial self-incrimination if the subpoena can be executed by some employee, such as the comptroller. The Fifth Circuit rejected that argument, finding that the individual proprietor had always retained control of his records, even if he had allowed his employees access to them for business purposes. The Fifth Circuit held that to permit the subpoena to be enforced if served on an employee with such access "would . . . be to honor form over substance and to render meaningless Kent's fifth amendment privilege." 646 F.2d at 969. That conclusion applies *a fortiori* to this case, where it is conceded that petitioner has always been the sole custodian of the records in question (Br. in Opp., p. 2) and where no other employee has been subpoenaed.

III

THE SOLICITOR GENERAL SHOULD NOT BE PERMITTED TO SELECT WHICH CASE WILL BE HEARD BY THIS COURT TO RESOLVE AN EXISTING CONFLICT

Since the question is important and recurring and since there is no real doubt as to the existence of a conflict,[2] the standards prescribed by this Court's Rules 17.1(a) and 17.1(c) have been met, and the writ of certiorari should be granted. The Solicitor General's assertion that it is "premature" to grant certiorari appears to be a tactical choice by the government to select a more appealing factual context in which to secure the ruling the government would like on the question reserved by this Court in *Fisher* v. *United States*, 425 U.S. 391, 414 (1976). The government would prefer, no doubt, to have the issue decided in a case involving a very large sole proprietorship, where no personal documents of any kind are sought by the subpoena, rather than on the facts of this case. In the meantime, the government is prepared to leave the lower courts in doubt, to permit subpoenas to be enforced differently in different parts of the country, and to subject individuals to substantial uncertainty regarding their constitutional rights. This Court should not permit the Solicitor General to control the Court's

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[2] Indeed, footnote 1 of the Second Circuit's August 7, 1981 decision in *In re Grand Jury Subpoena Dues Tecum Dated April 23, 1981*, No. 81-6086, indicates that the Second Circuit also reads its earlier opinions as barring enforcement of a subpoena which calls for "production" of non-corporate records, even without oral testimony, on the ground that "such production does constitute testimony and if compelled will violate the Fifth Amendment." Slip op. at 4530 n.1. Compare Br. in Opp., pp. 7-8.

docket in this manner and should not foster the continuing uncertainty which results from what the Solicitor General calls "the incipient emergence of a conflict" (Br. in Opp., p. 11).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)

MARTIN D. MINSKER
SUZANNA SHERRY
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

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